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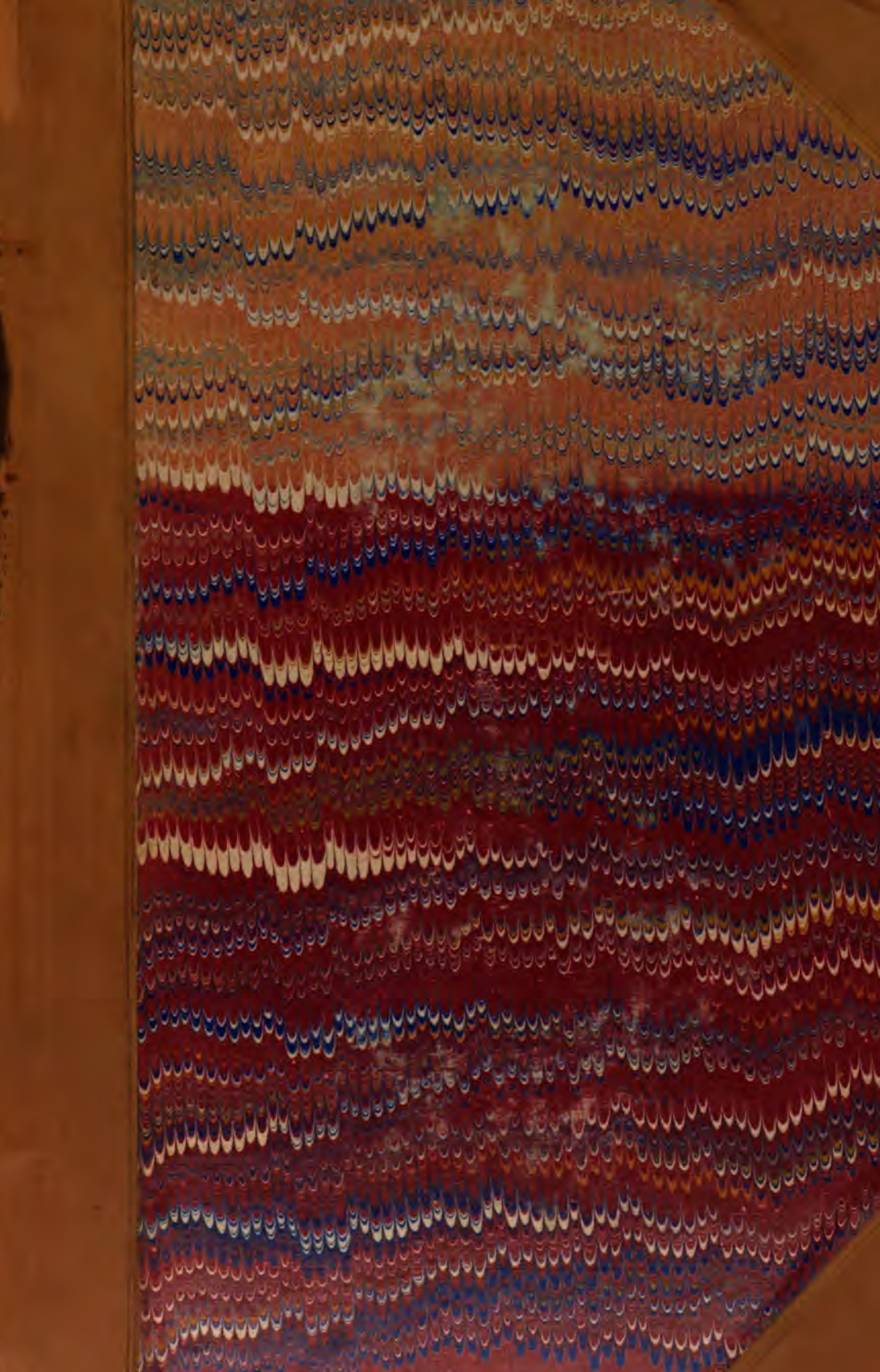
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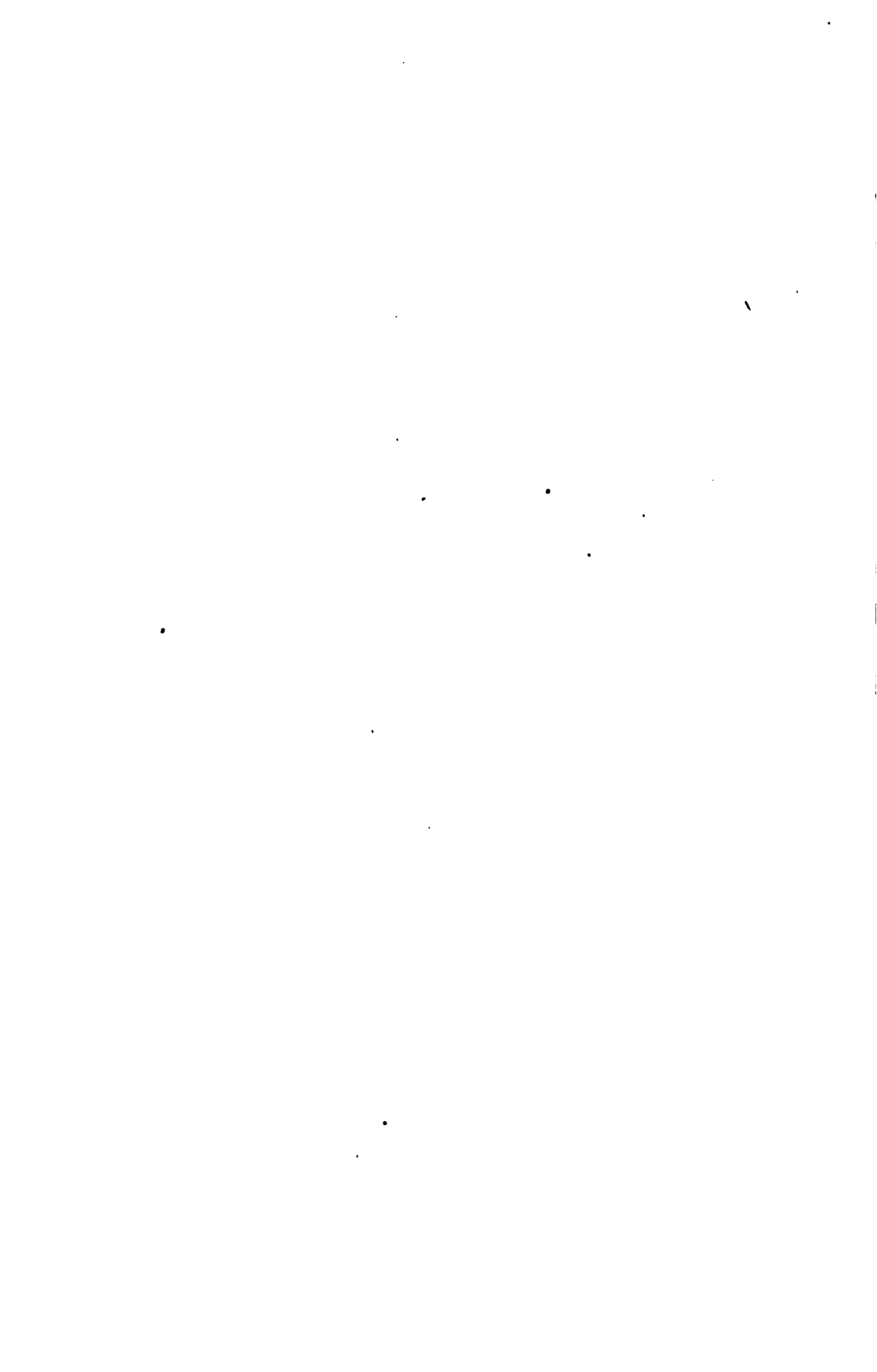
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VI

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By

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DE QUÉBEC.

VOL. IV. --- 1878.

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THE
QUEBEC LAW REPORTS.

RAPPORT JUDICIAIRES
DE QUÉBEC.

COUR SUPÉRIEURE, TROIS-RIVIÈRES,

FÉVRIER, 1878.

Coram POLETTE, J.

T. E. NORMAND, *et al.*,

Demandeurs,

vs.

THE ST. LAWRENCE STEAM NAVIGATION CO. (limited.)

Défenderesse.

LÉGISLATURES PROVINCIALES—DOMAINE PUBLIC—LETTRES
PATENTES.

JUGE:—Que les pouvoirs des Législatures des Provinces ne s'étendent pas aux rivières navigables, ni à leurs lits, mais seulement [quant à ce qui a rapport au domaine public] à l'administration et à la vente des terres publiques appartenant aux Provinces, et aux bois et forêts qui s'y trouvent.

Que le Gouvernement de la Province de Québec n'a pas le pouvoir d'émettre des Lettres-Patentes octroyant un lot de terre à eau profonde dans une rivière navigable.

Que le Souverain, lui-même, ne peut pas, par un octroi, empêcher la libre navigation des rivières navigables, ni qu'on se serve des rivages de ces rivières pour les besoins de la navigation, ni y imposer des droits.

La Cour, etc.

Attendu que les demandeurs fondent leurs droits sur des Lettres-Patentes qu'ils ont obtenues le premier de septembre

Normand, et al., 1873, du Gouvernement de la Province de Québec, leur octroyant un lot de terre en eau profonde dans le chenal est de la rivière St. Maurice, dans le district de Trois-Rivières, borné au nord-est par la ligne ordinaire des basses eaux, à la devanture de leur propriété et adjacent à icelle, sur toute sa longueur, et aux autres côtés par l'eau profonde de la dite rivière, ainsi qu'il est désigné dans ces Lettres Patentes et au plan y annexé; et réclamation de la défenderesse la somme portée dans leurs conclusions pour usage et occupation et dommages, pour avoir la dite défenderesse, à la fermeture de la navigation, l'automne de 1874, vers la fin de novembre, mis en hivernement, sans droit ni permission, sept bateaux-à-vapeur à elle appartenant dans la rivière St. Maurice, en dedans des limites sus-mentionnées de l'eau profonde dont les demandeurs se disent propriétaires, en possession, en vertu des dites Lettres Patentes, lesquels bateaux sont demeurés dans cette eau profonde jusqu'à l'ouverture de la navigation de 1875, vers le 1er de mai; et aussi pour avoir, la dite défenderesse, sans droit ni permission, usé à son gré et eu l'usage, tant par elle-même que par ses employés, de la grève et de la terre ferme appartenant aux demandeurs, en passant pendant toute la saison de l'hiver et du printemps sur le terrain ferme, appartenant aux demandeurs, et y repassant chaque jour et détériorant les propriétés des demandeurs;

Attendu que la défenderesse plaide entr'autres choses, par ses défenses, que le lot de grève et d'eau profonde octroyés aux demandeurs par le Gouvernement de la Province de Québec forme partie de la rivière St. Maurice à son embouchure où elle tombe dans le fleuve St. Laurent, et qu'à cet endroit elle fait partie du dit fleuve; que le Gouvernement de Québec n'avait aucune autorité d'octroyer ce lot de grève et d'eau profonde qui est sous le contrôle du Gouvernement de la Puissance du Canada, et que les Lettres Patentes nuisent à la navigation des dits fleuve et rivière; que les Lettres Patentes ne comportent aucune obligation d'y construire des quais ou autres travaux, qu'elles ont été octroyées sans le consentement et l'approbation du Gouvernement de la Puissance du Canada, et que, partant, elles sont nulles, que l'endroit occupé par les bateaux-à-vapeur de la défenderesse forme partie des eaux navigables des dits fleuve et rivière; que les demandeurs n'ont pas fait de quais ni autres travaux sur le dit lot de grève et d'eau profonde dont ils n'ont jamais été en

possession, et où ont hiverné les bateaux de la défenderesse, lequel lot est encore ouvert et libre à la navigation, y compris l'hivernement des vaisseaux; qu'en supposant les Lettres Patentes valables les demandeurs ne pourraient pas réclamer le droit de se faire payer une indemnité avant d'avoir fait des travaux ou dépenses qui pourraient retirer le lot du commerce public ou qui pourraient servir ou être utiles à la navigation; que l'endroit où la défenderesse a mis ses bateaux dans le temps sus-mentionné n'a aucune valeur, et que cette occupation n'a porté aucun préjudice, ni causé aucun dommage aux demandeurs; que les employés de la défenderesse n'ont pas même passé sur la propriété des demandeurs pour se rendre aux bateaux de cette dernière, mais bien sur la propriété de George Baptist & Sons, et que les demandeurs ne sont pas propriétaires riverains où se trouve le lot de grève et d'eau profonde; que la défenderesse nie les allégations de la déclaration des demandeurs et conclut à la nullité des Lettres Patentes et au débouté de l'action des demandeurs;

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Attendu que par réponses spéciales aux deux premières défenses de la défenderesse, les demandeurs allèguent entr'autres choses, que les Lettres Patentes ont été octroyées suivant la loi, après avis donné aux autorités compétentes représentant le pouvoir du Gouvernement de la Puissance du Canada et le consentement de celle-ci; que le Gouvernement de la Province de Québec a d'ailleurs le pouvoir d'octroyer de telles Lettres Patentes et que ce pouvoir existe et a été exercé depuis huit ans et au-delà, qu'un tel pouvoir est, par l'acte de l'Amérique Britannique du Nord, 1867, conféré au Gouvernement de la Province de Québec; que la défenderesse n'allègue aucune des raisons ou nullités nécessaires pour obtenir la nullité des Lettres Patentes, lesquelles ne peuvent être annulées que pour cause d'erreur sur des matières essentielles, et qu'elle n'en allègue pas dans ses défenses; qu'eux demandeurs ont obtenu par Lettres Patentes le droit de se servir des lots de grève et eau profonde comme propriété et comme les terres tenues en franc et commun soccage, sans aucune obligation ni restriction; qu'ils nient tous les faits et matières contenues dans les défenses de la défenderesse, et concluent au débouté de ces défenses;

Attendu que le Gouvernement de la Province de Québec a été informé de l'existence de l'action en la présente cause, par

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des copies de la déclaration des demandeurs et des défenses de la défenderesse, remises au Procureur Général de la dite Province, lequel a déclaré en réponse à la demande qui lui a été faite d'intervenir pour la couronne, qu'il était d'avis qu'il n'était pas nécessaire que la couronne comparut ou intervint ;

Considérant 1° que par l'acte de l'Amérique Britannique du Nord 1867, l'autorité Législative de la Puissance du Canada s'étend sur tous les sujets et matières mentionnés dans la section 91 de cet acte, parmi lesquels se trouvent la navigation et les bâtiments ou navires, ainsi que les amarques, bouées et phares, les pêcheries des côtes de la mer et de l'intérieur, lesquels sujets, y est-il dit, ne tombent pas dans la catégorie des matières d'une nature locale compris dans les sujets et matières assignés aux législatures des Provinces ; et que par suite, l'exercice des droits et pouvoirs qui en découlent, appartient exclusivement au Gouvernement exécutif de la Puissance ; 2° que le Gouvernement de la Puissance ayant toute l'autorité législative et exécutive sur la navigation et les batiments, l'a, par conséquent, sur les rivières navigables et sur leurs lits, de même que sur leurs bords et rivages quant à ce qui peut être nécessaire à la navigation ; 3° que les pouvoirs des Législatures des Provinces ne s'étendant pas aux rivières navigables ni à leurs lits ni à leurs rivages, mais seulement, quant à ce qui a rapport au domaine public, à l'administration et à la vente des terres publiques appartenant aux Provinces et aux bois et forêts qui s'y trouvent, et que les pouvoirs exécutifs des Provinces n'allant pas au delà sur ce sujet, il s'ensuit que le Gouvernement de la Province de Québec n'avait pas le pouvoir d'octroyer le lot de terre à eaux profondes sus mentionné, ni d'accorder conséquemment les Lettres Patentes en question, lesquelles sont nulles à leur face même ;

Considérant 1° qu'en supposant les Lettres Patentes valables, cependant elles ne pourraient conférer aux demandeurs plus de droits qu'en possédait le Souverain lui-même, lequel ne peut par aucun octroi, empêcher la libre navigation des rivières navigables, ni qu'on se serve des rivages de ces rivières pour les besoins de la navigation, ni y imposer des droits ; 2° que la Rivière St. Maurice, à l'endroit où les bateaux à vapeur de la défenderesse ont hiverné, est navigable, et que la navigation des vaisseaux d'un lieu à un autre sur les rivières navigables en cette Province, étant forcément arrêtés une partie de l'automne,

l'hiver et une partie du printemps, les vaisseaux sont mis en hivernement pendant ce temps, soit dans le fleuve, soit dans ces rivières, ce qui appartient encore à la navigation et n'en saurait être séparé, et donne les mêmes droits tant sur les rivières où ils hivernent que sur leurs rivages, pour les y mettre et tenir en sûreté, les gréer et dégréer, les garder et surveiller, et les visiter au besoin ; 3° que les demandeurs n'ont pas construits de quais ni fait d'autres ouvrages sur le lot de terre en eau profonde susmentionné ni sur le rivage, pour l'utilité de la navigation ni pour l'hivernement des vaisseaux, de manière à pouvoir demander une indemnité ; qu'ainsi les demandeurs n'ont aucun droit d'exiger aucune somme d'argent de la défenderesse pour l'usage et occupation de la place où les bateaux à vapeur de cette dernière ont hiverné, ni pour le passage de ses employés sur le rivage de la rivière au même endroit ;

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Considérant que le terrain sur lequel les employés de la défenderesse ont passé et repassé est inculte ; que ses employés passaient ainsi dans des sentiers battus depuis nombre d'années pour se rendre au chemin public qui est proche de la côte de la rivière en cet endroit, et où beaucoup de personnes étaient dans l'usage de passer presque journellement, et qu'ils ne paraissent pas y avoir causé de dommages ; qu'il ne paraît pas que les demandeurs ni leur prédécesseur aient jamais fait défense à qui que ce soit d'y passer ; qu'ainsi les demandeurs ne peuvent pas demander de dommages à la défenderesse ; en conséquence, déclare les dites Lettres Patentes nulles à leur face même et, d'abondant, les annule et met à néant ; déboute les dits demandeurs de leur action en la présente cause, et les condamne aux dépens.

Gervais & Gérin, pour les Demandeurs.

Wm. McDougall, C. R., pour la Défenderesse.

CIRCUIT COURT, 1878.

CIRCUIT COURT, QUEBEC.

20th NOVEMBER 1877.

Coram CARON, J.

BRYANT v. FITZGERALD,

HELD:—That a person receiving money in payment of a certain debt, cannot retain therefrom, without the debtor's consent, the amount of a pre-existing debt.

The defendant sold plaintiff certain groceries, and received, in payment, a bank note, from which, after deducting the price of them, he also retained the price of other effects previously sold to plaintiff, to whom he offered the balance.

This was refused by plaintiff, who thereupon demanded his money back, and meeting with a refusal, left the groceries just purchased, in the defendant's store, and sued him for the amount of the bank note.

The court held that defendant had no right to retain the money and rendered judgment against him, with costs of suit.

Bélard & Rouleau, for Plaintiff.

Molony, for Defendant.

COUR SUPÉRIEURE, QUÉBEC

5 FÉVRIER, 1878.

Coram McCORD, J.VENNER v. SEGUY *et al.*

JUGÉ:—1° Qu'une déclaration ne peut être amendée, si par l'amendement la nature de la demande est changée

2° Que c'est changer la nature de la demande que de réclamer par sa déclaration amendée une somme, en vertu d'un contrat de prix, en alléguant un billet promissoire comme reconnaissance de la dette, quand, par la déclaration première, on ne réclamait la somme qu'en vertu du dit billet promissoire.

Cette action fut intentée contre les défendeurs Seguy et Lemonier sur un billet promissoire que le demandeur alléguait avoir été fait par le défendeur Seguy à l'ordre du défendeur Le-

monier, et avoir été endossé par ce dernier, et subséquemment transporté au demandeur pour valeur reçue. Cet allégué du demandeur était erroné ; car en réalité le billet était fait payable à Lemonier personnellement et non pas à son ordre, de sorte que celui-ci n'avait pu le transporter au demandeur par simple endossement et qu'à la face même du billet il n'apparaissait pas de lien de droit entre le demandeur et le défendeur Seguy. Avant contestation liée le demandeur fit motion pour amender sa déclaration comme suit : " que les défendeurs doivent au demandeur cent piastres et dix-huit centins, pour autant en argent prêté pour laquelle somme les défendeurs donnèrent au demandeur un billet promissoire signé par le dit Seguy et endossé par Lemonier comme aval," appuyant sa motion sur l'article 53 du Code de Procédure Civile. Le défendeur Seguy prétendit que la motion ne pouvait être accordée, attendu que d'après la dernière partie du même article 53 C. P. C., un amendement ne peut être permis s'il change la nature de la demande et que dans ce cas-ci l'amendement changeait la nature de la demande, parceque par la déclaration première le défendeur est poursuivi pour une dette commerciale, laquelle se prescrit par cinq ans et peut avoir été créée par toutes sortes de contrats, vente, louage, etc., et qu'en matières commerciales les lois qui régissent la preuve sont toutes spéciales, et que par la déclaration amendée le défendeur serait poursuivi pour une dette civile, créée par un contrat de droit civil, le contrat de prix, dette prescriptible par trente ans et dont la preuve ne peut être faite par témoins. La motion du demandeur est rejetée.

Motion rejetée

R. Chambers, pour le Demandeur.

Alfred Cloutier, pour le Défendeur Seguy.

SUPERIOR COURT, QUEBEC.

25TH FEBRUARY, 1878.

No. 2546.

Coram MEREDITH, C. J.BERTRAND *et uxor* vs. POULIOT.

HELD:—That the husband and wife, common as to property, may sue together for a debt due the community.

That the marriage of the Plaintiff, if admitted, need not be proved.

Per curiam.—In this case the plaintiffs, who are husband and wife, *communs en biens*, sue for a debt, which the defendant undertook to pay by a notarial instrument, in which it is admitted that the debt in question "*est tombée dans la communauté*" "*qui existe entre le dit François Bertrand et son épouse*," the plaintiffs.

The defendant contends that the female plaintiff has been improperly made a party in this cause, and has cited numerous authorities as supporting his contention. Those authorities show, as indeed is quite certain, that the plaintiff Bertrand might have sued alone.

The words of the Custom, even as to the moveable actions of the wife, are "*et peut le dit mari agir seul*," (1) and those of the Code are to the same effect "he may exercise alone all the "moveable and possessory actions which belong to his wife."

But I know of no law which prevents a husband and wife, common as to property, from suing together for a debt due to the community.

The defendant cited some judgments rendered since the passing of the registry law dismissing, in so far as the wife was concerned, actions brought against husband and wife as *communs*. These judgments, as I believe, were rendered on the ground that during the community there was no necessity for a judgment against the wife *commune*, and that a judgment against her might subject her to a greater liability than allowable

(1) Art. 233 C. de P.

under 36th section of the registry ordinance, reproduced by our Code. But there is a sufficiently plain difference between a condemnation against a *femme commune*, and a judgment in her favor; and I cannot see that a judgment awarding to a husband and wife, *communs en biens*, a debt due to their community would infringe any rule of law or principle of justice.

Mr. Justice TASCHEREAU, shortly before his elevation to the Supreme Court, had to adjudicate upon an action against a husband and wife *communs en biens*, the plaintiff was the Hon. G. O. Stuart, Judge of the Court of Admiralty, the defendants being a Mr. Charlton and his wife. Judge TASCHEREAU, after giving the subject full consideration, and being aware of the rendering of the judgments already spoken of, maintained the action as well against the wife as against the husband, but he was careful to frame his judgment so as to prevent it from being, in letter or spirit, opposed to the provisions of our law passed for the protection of married women. And in a subsequent case in the Court of Review (1) he maintained the same doctrine.

I made a note of the judgments so rendered by Mr. Justice TASCHEREAU, when the second judgment was given, but not of the authorities upon which they were founded. I find, however, that those judgments are in accordance with as high an authority as can be cited on such a subject, the opinion of Pothier, which is to be found in No. 473 of his *Traité de la Communauté*, cited, I may observe, by the defendant. Pothier after mentioning the general principle already adverted to, adds :

“ Quoique ces actions qu'on a contre la femme puissent être valablement intentées et poursuivies contre le mari seul, néanmoins un créancier de la femme a intérêt d'assigner le mari et la femme afin que la condamnation qu'il obtiendra contre le mari et la femme lui donne une hypothèque sur les biens de la femme.”

If the husband and wife, *communs*, may, as Pothier says, be sued jointly, I can see no reason for saying that they may not sue in the same way.

(1) 1538, Langevin vs. Galarneau, February 1872. The case of Stuart vs. Charlton et ux. was a short time previously.

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It is satisfactory to be able to refer to authorities such as those just quoted, but even if I were not aware of them, I would, upon general principles, have decided in the same way.

It was also contended that the marriage of the plaintiffs was not proved; but it is expressly admitted, and I am not aware that a judgment condemning the defendant to pay a debt which she has acknowledged to owe to the plaintiffs as *communs en biens* can affect any question of public order.

Admissions of the same nature, in cases less favorable than the present, have been received in several cases, as well by the Superior Court as by the Court of Review, in this district. (1)

The judgment, which is in favor of the plaintiffs for \$3,000 and interest, is fully motiv  .

Seeing that by the deed styled "*acte d'accord*," of the 29th August 1876, executed before Charlebois, N. P., the defendant as surety for one F. X. Garant promised and undertook jointly and severally with him, and for the consideration in the said *acte d'accord* set forth, to pay to the plaintiffs a certain sum of \$3,000, and in and by the said deed it was expressly declared and admitted that the said debt and interest belonged to the community of property existing between the plaintiffs as husband and wife ;

And seeing that although the said Frs. Bertrand might alone have instituted the present action as head, *chef*, of the community of property existing, as admitted by the said deed, between him and his said wife, yet that there is nothing either, in law or reason to prevent the plaintiffs from claiming the said debt by a judicial proceeding in the same way as the defendant promised to pay the same by an extra-judicial contract, and seeing that the defendant hath no interest whatever in objecting to the said female plaintiff being a party in this cause ;

It is considered and adjudged that the defendant do pay to

(1) April 1876, S. C., Dubeau vs. Leclerc and Hamel. 30 May 1877, Lamontagne et ux. vs. Gingras, judgment by Casault, J., confirmed by Meredith, Stuart, Caron, J.J.

the plaintiffs as being *so communs en biens*, the said sum demanded with interest and costs.

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Judgment accordingly.

Alleyne & Chauveau, for Plaintiffs.

Dechene, for Defendant.

COUR DU BANC DE LA REINE—EN APPEL.

QUEBEC, 5 MARS, 1878.

No. 86.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J

KINGSBOROUGH ET POWND,

DÉCLARATION DE PATERNITÉ—SÉDUCTION.

JUGÉ.—Qu'une poursuite en déclaration de paternité et demande de pension pour l'enfant peut être jointe à l'action en dommages par la mère, résultant de la séduction.—Ces deux chefs de poursuite ne sont ni incompatibles, ni contradictoires.

La mère peut porter l'action en son propre nom, sans qu'elle soit nommée tutrice.

Le Juge Tessier prononce le jugement de la cour ainsi qu'il suit :

Le présent appel est d'une demande en déclaration de paternité et en dommages.

L'Intimée Martha Pownd, fille majeure, résidant dans le canton d'Inverness, a poursuivi l'appelant Thomas Kingsborough, pour le père d'un enfant qu'elle a mis au jour le 14 juillet 1874 à Inverness ; elle réclamait en même temps que le défendeur fut condamné à lui payer une pension annuelle pour le soutien de cet enfant depuis sa naissance jusqu'à l'âge de 20 ans, à raison de \$200 par an, et de plus des dommages pour la mère au montant de sept cent cinquante piastres.

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Le jugement a été rendu le 25 juin 1877 déclarant le défendeur père de l'enfant, et le condamnant à payer à la demanderesse pour la nourriture, les soins et l'éducation de l'enfant jusqu'à ce qu'il ait atteint l'âge de 16 ans une rente ou pension de \$30 par chaque trois mois à compter de la naissance de l'enfant et les dépens.

C'est ce jugement qui est mis en appel, et il s'agit d'examiner s'il est d'accord avec la loi et la preuve faite en cette cause.

L'appelant a opposé plusieurs défenses en Cour Inférieure.

1° Le défendeur a plaidé litispendance, alléguant que par une action précédente la demanderesse a réclamé des dommages. Il suffit de dire que le jugement qui est soumis à la révision de cette cour n'accorde aucuns dommages, de sorte que l'appelant n'a pas à s'en plaindre ; il suffira, en réformant les motifs et le dispositif de ce jugement de débouter la portion de l'action qui réclame des dommages pour la demanderesse.

Il est en effet en preuve qu'en 1874 la demanderesse avait porté une action en dommages résultant d'une promesse de mariage ; mais cette promesse n'ayant pas été prouvée, l'action a été avec raison déboutée.

En 1875 la demanderesse a porté une seconde action en dommages résultant seulement de la séduction sans alléguer la promesse de mariage ; c'est cette action qui paraît être encore pendante.

2°. La seconde objection du défendeur est que la demanderesse aurait cumulé dans la même action une poursuite en déclaration de paternité et demande de pension pour l'enfant, avec une action en dommages pour la mère, résultant de la séduction. Ces deux chefs de poursuite ne sont ni incompatibles ni contradictoires, et la Cour Inférieure a bien jugé en rejetant ce moyen.

3°. Le défendeur objecte encore que la demanderesse ne pouvait pas en son propre nom, poursuivre en déclaration de paternité et pour pension de l'enfant, sans se faire nommer tutrice à l'enfant.

Cette objection a quelque force, et il semble, en effet, d'après les principes généraux, qu'elle eut mieux fait de se faire nommer

tutrice et de prendre cette qualité, quoiqu'il apparaisse qu'elle ait été plus tard nommé tutrice à cet enfant.

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Néanmoins la jurisprudence dans l'ancien droit français, et un bon nombre de causes décidées par nos tribunaux, ont maintenu l'action de la mère en son propre nom, sans qu'elle fut nommée tutrice.

Fournel, Traité de la séduction, page 26. " La fille majeure qui s'est laissée abuser a le droit de former l'action en déclaration de paternité, soit pour charger l'auteur de sa grossesse de l'éducation de l'enfant, soit pour obtenir des dommages intérêts." Fournel, p. 129.

Toullier, vol. 2, No. 937, en parlant de la différence entre le droit actuel en France et l'ancien droit dit :

" Dans l'ancien droit une fille était libre de diriger une action en déclaration de paternité contre celui qu'elle croyait ou qu'elle disait être le père de son enfant. Il suffisait, pour réussir, de donner des preuves de fréquentation et de familiarité entr'elle et celui qu'elle accusait." Notre Code, art. 241, ne change pas le droit ancien, et conservé la recherche judiciaire de la paternité à l'enfant ; mais cela n'exclut pas le droit d'action de la mère. Toullier est cité au bas de cet article.

En 1821, il en a été ainsi décidé dans la cause de *Mathieu vs. Létourneau*. Robertson's Digest, page 133.

En 1871, *Bilodeau vs. Tremblay*, 8 Revue Légale, p. 445, il a été décidé que la mère d'un enfant illégitime " a en son propre nom, et sans être nommée tutrice à son enfant, une action contre le père en déclaration de paternité et pour le soutien de l'enfant."

La même doctrine paraît avoir prévalu en Cour d'Appel, *Patoille vs. Desmarais*, 1 Lower Canada Law Journal, p. 58.

Maintenant le défendeur ayant aussi produit une dénégation générale, il faut considérer si la preuve de connection et de paternité est suffisante.

Il appert qu'à l'époque de cette intimité criminelle entre les parties le défendeur, jeune homme non marié, un peu plus âgé que

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la demanderesse, possédait une terre voisine de celle où vivait la demanderesse, avec ses père et mère et une plus jeune sœur. Le défendeur n'avait pas de maison sur sa terre. et quand il est venu pour cultiver cette terre et faire sa récolte dans l'automne de 1873, il se retirait souvent de jour et de nuit dans la maison de la demanderesse. La mère et la sœur prouvent que le défendeur visitait souvent la demanderesse et que plusieurs fois ils ont couché dans la même chambre. La mère essaie de s'excuser en disant qu'elle croyait qu'ils se marieraient ensemble, sans toutefois prouver aucune promesse de ce genre.

Le défendeur a passé l'hiver aux Etats Unis, et à son retour lorsqu'il lui a été dit par John Greenlay, témoin entendu, que lui le défendeur était accusé du fait, il a fait des demis aveux.

A cela on peut ajouter comme simple confirmation du fait déjà prouvé la déclaration de la demanderesse qu'elle a faite sous serment le 20 mai 1874, qu'elle était enceinte des œuvres du défendeur du 15 octobre 1873, et en effet à une date correspondante justement de neuf mois, elle a mis au jour l'enfant en question, lequel est encore vivant.

Il est vrai de dire que le défendeur a prouvé par des témoins des faits particuliers contraires à la chasteté de la demanderesse; mais ces faits sont subséquents au 15 octobre 1873, et cela ne détruit pas la culpabilité du défendeur.

Sous ces circonstances, cette cour se trouve obligée de confirmer le jugement rendu, mais en le réformant, en retranchant le montant des arrérages de pension accordés par le jugement précédant l'action, parcequ'ils ne sont pas demandés dans les conclusions de la demande, mais faisant courir simplement cette pension du jour de l'assignation, 22 mars 1876, ainsi que demandé, avec les frais tant de la Cour Inférieure que de la présente cour contre l'appelant.

Jugement en conséquence.

Sewell & Gibsone, pour l'appelant.

Austin, pour l'Intimée.

VICE ADMIRALTY COURT, QUEBEC.

11th JANUARY 1878.

Present HON. G. OKILL STUART.THE NORMANTON, ACTION OF CURWEN, *et al.*

Where a claim for damages awarded in a case of collision was reduced by more than one third,

Held: that the costs of Reference to the Registrar and Merchants should be borne by the claimant although his suit was for a smaller sum of which the amount allowed and interest thereon would be less than a third.

On the 28th of April 1876 a reference was made to the Registrar and Merchants to settle the damage done to the *N. Churchill* by the *Normanton* in a case of collision. The claim submitted to them was for \$35,466.38 from which they have, after a long and careful enquiry, struck off \$18,896.11, more than one third, and the question now is, whether the admiralty rule which subjects a suitor in such cases to the costs of the reference should apply. A first report of the Registrar and Merchants allowed the sum of \$20,168.98 with which each party was dissatisfied. Each contested the report. The owners of the *N. Churchill* persisted in claiming the amount struck off by the Registrar and Merchants, and the owners of the *Normanton* contested the principle upon which they had acted instead of which they contended that the *N. Churchill* was so materially damaged that she should have been treated as a total loss. Judgment upon these contestations was rendered on the 12th of October last by which no further change was effected than the addition of three items to the amount allowed by the report forming a sum of \$1,401.29 which leaves the amount struck off still more than one third. This result was obtained upon a renewed reference to the Registrar and Merchants, and is to be found in a second report made by them. The first and second reports are to be considered as one, and the questions now submitted which were reserved by the last mentioned judgment are as to the payment of the costs of the reference and the costs of the two contestations of the report. Two motions have been made and the parties have been heard upon them. By one the owner of the *Normanton* prays that inasmuch as by the reports of the Registrar and Merchants, more than one-third of the claim was struck

The "Normanton."

off, the owners of the *N. Churchill* should pay the costs of reference, and by the other the owners of the *N. Churchill* ask that inasmuch as the amount of security given by the owners of the *Normanton* was \$31,000 and the sums allowed with interest which amounted to \$23,584, would bring the amount to less than one-fourth of that sum, the costs of reference should be allowed to the owners of the *N. Churchill*. It is quite a mistake to suppose that because bail was received to the amount of \$31,000 in favor of the *N. Churchill*, the power of adjudication by this court was restricted to that amount. The claim of \$35,466.38 is in excess of the bail given by \$4,466.38, and evidence very voluminous has been adduced to support it in its entirety. It is not to be supposed that the owners of the *N. Churchill* adopted this course without an object or as an idle amusement but on the contrary to give effect to the entire claim in some form. It may be that where an excess over and above the amount of bail for the release of the ship has been established this court will allow a second arrest of the ship to make up the deficiency, or do as was done in the case of the *Témiscouata* (a), where, the amount of the bail being insufficient to cover the amount of a judgment and costs, the defendant was personally condemned in the latter. As respects the introduction of interest to increase the claim as allowed, this formed no part of the reference, and the rights of the parties are to be determined by their relative positions upon the entry of the suit, and therefore cannot be applied as desired.

Now as respects the contestations of the report of the Registrar and Merchants it is to be observed that the owners of the *N. Churchill* have gone into evidence and have failed to the extent of \$18,896.11 and succeeded to the amount of \$1,401.29. The incurring of all the expense attending this contestation as respects evidence was unnecessary as the whole subject had been thoroughly investigated before the Registrar and Merchants and the evidence already adduced was sufficient. Had the contestation of the owners of the *N. Churchill* been limited to the three items which have been added by the second report they would have been allowed their costs. On the other hand, the owners of the *Normanton* have contributed to an unnecessary contestation by put-

(a) Spink's R. 208.

ting in issue a vital principle which if conceded would have reduced the claim of the *N. Churchill* much more. Had the owners of the *Normanton* instead, acquiesced in the items allowed by the second report without contesting further they would have been entitled to their costs. As it is the parties have each provoked a long and unnecessary litigation which imposes upon this court the necessity of declaring that each party must bear their own costs on the contestations of the report.

The "*Normanton*."

The result of the entire litigation in this matter is that the second report of the Registrar and Merchants as amending their first report stands confirmed. The judgment of this court now settles the amount of damages awarded to the *N. Churchill* at the sum of \$21,570.27, to bear interest on \$1,500 from 28th April 1876, and on \$20,070.27 from the 3rd of May 1876, with the costs of suit as already awarded, at the same time condemning the owners of the *N. Churchill* in the costs of reference on each report and declaring as respects the contestations of the first report no costs be awarded to either party. The motion on the side of the *Normanton* as respects the costs of reference is allowed and that on the side of the *N. Churchill* for the same object is rejected with costs.

Langlois, Angers & Larue, for the *N. Churchill*.

Andrews, Caron & Andrews, for the *Normanton*.

COUR DE RÉVISION, QUÉBEC.

Coram MEREDITH, J. C., STUART, J., CASAULT, J.

LAUZON vs. THE QUEBEC STREET RAILWAY COMPANY,

CHEMINS DE FER—EXPROPRIATION—DOMMAGES—MUNICIPALITÉ.

Jugé :—1° Que l'acte d'incorporation de la défenderesse autorisait la Corporation de St-Sauveur à lui permettre de construire une voie ferrée dans le chemin où elle l'a mis, et d'y faire les travaux nécessaires pour cet objet.

2° Que la défenderesse, en nivelant et exhaussant le chemin pour y construire la dite voie ferrée, n'a pas outrepassé les droits que lui conférait son contrat avec la dite Corporation, ni cette dernière, en l'y autorisant, les pouvoirs que lui donnait la loi.

3° Que le recours en dommage des propriétaires riverains, si dans ce cas ils en avaient aucun, était contre la municipalité et non contre la défenderesse ; et que l'augmentation de valeur que les travaux avaient donné à leur propriété devait, si elle l'égalait ou l'excédait, compenser l'indemnité réclamée.

CASAULT, J. :

Un acte de la ci-devant Province du Canada, 27 Vict, 61, autorise la Corporation qu'il crée à construire une voie ferrée sur la rue St. Valier, jusqu'à la barrière de péage, dans la banlieue de Québec, sur tous les chemins et toutes les rues de la cité et de la banlieue de Québec, sur lesquels elle en aura obtenu la permission de la Corporation de Québec (section 4) ; la section 5 dit que les lisses du chemin autorisé auront le même niveau que la rue, et la voie ferrée aura autant que possible la même déclivité (*grade*). " La cité de Québec, les municipalités adjacentes " ou aucune d'elles, et la dite compagnie sont par le présent " respectivement autorisées, à faire et à passer des arrangements " ou stipulations au sujet de la construction du dit chemin de fer " et de tous les travaux qui s'y rattachent, et de la circulation des " chars, sujets aux restrictions contenues dans le présent acte ; " à passer des règlements, et quand toutes les parties seront de " cet avis, à les amender, abroger ou rétablir aux fins de donner " suite à tels arrangements ou stipulations, et contenant toutes les " clauses, dispositions, règles et règlements nécessaires pour la

"gouverne de tous les intéressés et pour les faire mettre à exécution, etc., etc."

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Le Conseil Municipal de St. Sauveur, agissant en vertu de cette disposition statutaire, a le 11 août 1873, résolu d'accorder à la défenderesse, le droit de passage dans la partie de la rue St. Joseph qui s'étend entre les rues St. Ours et St. Valier, entr'autres conditions aux suivantes : "1° La Compagnie des chars urbains niveliera la dite partie de la rue St. Joseph dans toute sa largeur sur un bon fonds en pierre recouvert en macadam, 2° les lisses devront occuper le milieu de la dite rue St. Joseph."

En exécution de cette résolution, un contrat notarié a été passé entre les deux corporations par lequel la municipalité de Sauveur a conféré le droit à la défenderesse de construire une voie ferrée sur le milieu de la partie susdite de la rue St. Joseph aux conditions suivantes qui ne sont que la répétition de celles adoptées par le Conseil Municipal de St. Sauveur : "The said Quebec Street Railway Company shall keep in good repair the roadway between the rails and also make necessary repairs to the roadway one foot on each side of the track in wood or stone or by macadamizing at the Company's option, and on a level with the rails which said track, it is well understood, shall be in the centre of the street."

"It is understood and agreed that the said company shall and will, at the commencement, grade or level the road on each side of the track to the footpaths, the same to be done with earth, clay or stone at their option, but will not be bound afterwards to keep the same in repair beyond the width of twelve inches from the rails."

La défenderesse, en vertu de ces conventions, a nivelé la partie stipulée de la rue St. Joseph. Il paraît qu'à l'endroit où se trouve la propriété du demandeur, sur cette partie de la rue St. Joseph, il y avait un fossé, (des témoins disent un bournier) impassable à certaines saisons de l'année et faisant à cet endroit la rue beaucoup plus basse. La défenderesse a là haussé le niveau de la rue entre les trottoirs de manière à le faire correspondre aux autres parties et à établir dans le parcours de la rue une gradation usuelle nécessaire pour une voie ferrée. Ces

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travaux ont augmenté la hauteur de la rue à cet endroit de 2 pds. 9 pouces au centre et 2 pieds au trottoir (rapport d'expert). Le demandeur se plaint par son action de cette élévation par la défenderesse du niveau de la rue qu'il dit être contre la loi, et avoir obstrué les portes de sa maison et de la fabrique qui la joint, et en avoir rendu l'accès difficile et même dangereux, et il conclut à ce que la défenderesse soit condamnée à remettre les lieux dans l'état où ils étaient, ou à hausser le trottoir et ses bâtisses proportionnellement à la rue même, et à défaut de ce faire dans le délai à être fixé par le tribunal, à une condamnation contre la compagnie à \$400 de dommages.

La défenderesse a opposé à cette demande une dénégation générale et une exception où elle allègue que cette partie de la rue St. Joseph est dans la municipalité de St. Sauveur et sous le contrôle de son conseil municipal, les conventions susdites entre elle et cette municipalité, l'exécution des travaux stipulés sous le contrôle et avec l'approbation du dit conseil, et que la rue à cet endroit n'était que le lit d'un ancien fossé, et était presque impassable.

Qu'elle avait mis la rue en bon ordre et l'avait améliorée, et que les travaux qu'elle y avait faits avaient augmenté la valeur de la propriété du demandeur.

La preuve établit cette augmentation et aussi que l'entretien du chemin et des trottoirs étaient à la charge des propriétaires riverains, que le trottoir du demandeur ne consiste qu'en quelques planches détachées, et que la rue en cet endroit était à certaines saisons impassable. Louis Thérien témoin du demandeur et propriétaire du côté opposé de la rue dit : " Le chemin que la défenderesse a fait vis-à-vis chez nous et chez Lauzon, cause un grand bien par le fait que cela nous débarrasse de l'entretien d'une partie considérable du chemin. Nous avons à entretenir maintenant environ 7 à 8 pieds chacun, Lauzon et moi, et la défenderesse l'a bien fait, et nous n'avons pas encore eu d'ouvrage à faire pour l'entretien de ce chemin."

Tous les témoins de la défense sont unanimes quant à l'augmentation de valeur de la propriété du demandeur. Charles Baillairgé, ingénieur de la Cité, et comme tel surintendant de ces chemins, dit : " The works of the defendant are a great im-

“provement to the roadway,” et plus bas “I consider that the
 “levelling of the street is an improvement for the plaintiff’s
 “property, although there is some inconvenience just now from
 “the fact that the sidewalk opposite his property is not made
 “level with the street; the plaintiff’s sidewalk is rough and
 “loosely boarded.” Il dit en transquestion que tout ce qu’il faut
 est de relever le trottoir, et rehausser la porte de la bâtisse en
 bois seulement, dépenses que les experts évaluent à \$35.00, et
 dans leur réponse à la 6ème question de la référence, les experts
 eux-mêmes disent qu’ils ne voient pas d’autres dépréciations
 aux bâtisses.

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Samuel Moore, le surintendant à l’emploi de la défenderesse,
 et William Moore, l’ingénieur sous la direction duquel les tra-
 vaux ont été faits, disent que les travaux qui ont été faits ont
 considérablement augmenté la valeur de la propriété du deman-
 deur. S’ils étaient seuls leur témoignage n’aurait pas autant de
 force; mais outre MM. Baillairgé et Thérien, il y a encore M.
 Seymour, un ingénieur qui dit: “I look upon the works in
 “question as a public improvement calculated to augment the
 “value of surrounding properties.”

David Bell: “I consider that the works made by the defen-
 “dants have rendered the plaintiff’s property more valuable
 “than what it was,” et plus loin il dit: “I consider that the
 “value of the lot where the wooden building is, is enhanced
 “in value by double.”

James Dinning: “The works made by the defendant are a
 “public improvement and add to the value of property on both
 “sides of the street at that particular place,” et plus bas: “I
 “consider that the building of the road by the defendant has
 “augmented the value of the property, and the lot of ground
 “alone is to-day worth more than the ground and building pre-
 “vious to the work.”

Enfin François-Xavier Saucier dit: “Les travaux de la dé-
 “fenderesse, en nivelant la rue à l’endroit en question ont beau-
 “amélioré la voie publique. Avant les travaux, la rue à cet
 “endroit était très-mal tenue; c’était presque un borbier dans
 “certains endroits, vis-à-vis la propriété de Lauzon surtout.”

Voici une amélioration publique qui a fait un bon chemin

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là où il n'y avait qu'un bournier, qui a substitué à l'entretien nécessairement dispendieux de ce chemin impassable quelques pieds seulement d'un bon macadam, qui a augmenté considérablement la valeur de la propriété de la personne tenue à l'entretien de ce chemin, et qui ne requiert de lui que \$35.00 de dépense en tout et partout, et le jugement lui en accorde \$155.00. Il faut remarquer que l'interlocutoire ne laissait pas les experts libres de dire si l'augmentation de la valeur de la propriété ne compensait pas la dépréciation faite aux bâtisses, et n'excédait pas le coût des ouvrages qu'ils indiquent à leurs réponses à la 3^{me} et 4^{me} question que leur posait la référence.

Il faut bien aussi remarquer que leur réponse cinq est nécessitée par la question de la référence, mais que, dans leur sixième réponse, ils ne comprennent pas le coût de cet ouvrage dans ce qu'ils disent être la seule dépréciation que souffrent actuellement les bâtisses. Leur réponse mérite d'être reproduite en entier.

Réponse à la sixième question : " A part les montants par nous alloués pour relever le trottoir (réponse à la 3^{me} question \$20.00) et la porte de la bâtisse de bois (réponse à la 4^{me} question \$15.00) nous ne voyons pas de dépréciations aux bâtisses en aucune autre manière."

Il est évident que le jugement est pour \$120.00 de plus que n'ont rapporté les experts. Ils étaient obligés de répondre à la question de la référence (la 5^{me}) leur demandant ce que contiendrait l'exhaussement de la bâtisse, et ils disent \$120.00, mais lorsqu'on leur demande, à la sixième question, la valeur de la dépréciation des bâtisses, si elles restent telles qu'elles sont, ils répondent qu'après l'exhaussement du trottoir et de la porte, ils ne voient pas de dépréciations aux bâtisses en aucune manière. Or les travaux que demande le trottoir ne sont pas une dépréciation à la bâtisse, mais pour le propriétaire riverain une charge dont il ne peut pas réclamer la valeur à titre de dommage à sa propriété.

Les défendeurs se plaignent que le jugement accorde plus que demandé en ce qu'il les condamne au paiement d'une somme d'argent, tandis que les conclusions de l'action étaient alternatives. Il semble qu'outre ce défaut dans la condamnation, le

jugement accorde \$120.00 de plus qu'établi, que la seule dépréciation prouvée est de \$15.00 et en y ajoutant même le coût de l'exhaussement du trottoir, le demandeur n'en souffre qu'au montant de \$35.00, somme qui est plus que compensée par l'augmentation de valeur de la propriété du demandeur. \$20.00, coût de l'exhaussement du trottoir, ne donnent que \$1.20 d'intérêt annuel, ce qui doit être bien moins que le coût d'entretien du chemin dans l'état où il était.

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Il faut aussi remarquer que la question 3 de la référence ne se contente pas de demander le coût de l'exhaussement du trottoir, mais aussi celui de l'exhaussement du terrain dessous, ouvrage inutile, et que ce serait forcer la défenderesse à faire un ouvrage bien meilleur et bien plus dispendieux que ne l'étaient les quelques planches détachées (loose boards) qui composaient le trottoir du demandeur.

Le statut ci-dessus cité confère à la défenderesse le droit de construire une voie ferrée dans les rues de la cité de Québec et dans celles des municipalités voisines, après conventions spéciales avec les corporations. La rue, à l'endroit en question, est dans la municipalité de St. Sauveur qui a consenti à ce que la défenderesse y placât son chemin, aux conditions sus-énoncées qui, entr'autres, obligeaient la défenderesse à niveler à ses dépens la rue dans les endroits où ce nivellement était nécessaire. Or la corporation de St. Sauveur pouvait elle-même faire ce nivellement, et elle pouvait même l'ordonner par un règlement et le mettre à la charge des propriétaires tenus au chemin (code municipal, 533). Elle n'a pas exercé ce dernier pouvoir; mais, en exigeant que la défenderesse nivelât le chemin où besoin, elle l'a obligée à la confection des travaux qu'elle pouvait et qu'elle devait faire elle-même. La défenderesse n'était plus, par conséquent, pour ces travaux qu'un contracteur qui s'était obligé envers la corporation de St. Sauveur à niveler cette partie de la rue St. Joseph. Si elle a fait ces travaux suivant ses conventions, et que l'exhaussement de la rue, qu'ils ont nécessité, cause des dommages aux propriétés riveraines et les déprécient, ou leur impose une charge plus lourde ou des dépenses, le recours des propriétaires, s'ils en ont un, n'est pas contre la défenderesse, mais contre la municipalité qui a autorisé ces travaux. L'action n'ayant pas été prise contre la municipalité, il n'y a pas lieu de s'enquérir si le demandeur devait procéder par action devant

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les tribunaux ou conformément aux dispositions du code municipal (articles 908 et suiv.) Le Conseil Privé a tout récemment décidé dans la cause de *Le Maire et al. de Montréal et Drummond*, sous un statut qui règle la manière de déterminer les indemnités auxquelles les actes de la corporation de Montréal peuvent l'obliger, que le recours devait être celui indiqué par le statut, et non par l'action en justice.

Dans tous les cas, la défenderesse a, dans ces travaux, légalement exercé les pouvoirs que la loi permet à la corporation de St. Sauveur de lui accorder ; elle n'a donc pas commis le délit dont se plaint le demandeur : elle n'a qu'usé du droit que lui donnait la loi, elle n'a pas par conséquent encouru une responsabilité plus grande que celle qui fut échue à la municipalité de St. Sauveur, si, comme elle en avait le droit, elle eût elle-même fait les travaux qu'elle a obligé la défenderesse de faire pour elle ou pour les riverains qui y étaient tenus.

Si l'on suppose que le dommage dont se plaint le demandeur est une expropriation, et qu'à ce titre la Corporation de St. Sauveur, si elle eût fait les travaux, eût été obligée de l'indemniser, il faut nécessairement admettre que l'indemnité doit être diminuée de la valeur des avantages que le reste de la propriété expropriée retire de l'ouvrage, et être nulle si la valeur de ces avantages excède celle des dommages. Voici le texte de l'article 907 du Code Municipal : " Dans l'évaluation du terrain pris pour " un chemin public la valeur du chemin aboli qui échoit au " propriétaire exproprié en vertu de l'article 753, et les avantages " particuliers que ce propriétaire retire du nouveau chemin tel " que tracé, doivent être estimés et portés en déduction de la " valeur de ce terrain. Si c'est pour un autre ouvrage public " que le terrain est pris, les avantages que le propriétaire doit " retirer de l'ouvrage sont aussi estimés et portés en déduction " de la valeur du terrain."

La loi créant cette compensation lorsqu'il y a prise actuelle du terrain, on ne peut certainement pas la refuser lorsqu'au lieu d'une dépossession, il n'y a qu'une dépréciation causée par des travaux faits sur la propriété publique.

En l'absence de cette disposition expresse du Code Municipal, je crois que l'article 407 du Code Civil, qui est la copie de

l'article 545 du Code Napoléon, en ne donnant à l'exproprié que le droit à une *juste indemnité* avait déjà consacré cette règle ; autrement le législateur, au lieu d'une juste indemnité, eût dit *la valeur de la propriété et tous les dommages inhérents à l'expropriation même*. Ce n'est pas une prime ou un avantage que la loi veut accorder à l'exproprié, mais le tenir indemne de toute perte.

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Elle l'oblige de céder sa propriété quand cet abandon est nécessaire pour une amélioration publique, et ne voulant pas qu'il souffre plus que ses concitoyens, elle ordonne de l'indemniser. C'est une perte et un sacrifice qu'elle veut empêcher et non un gain qu'elle veut assurer. Sous l'empire de l'article 545, que, comme je viens de le dire, notre code a copié, la Cour de Cassation a, le 12 juin 1833 (Sir. 33, 1, 604), annulé le jugement de la cour royale de Paris, qui avait le 10 février 1829, condamné la ville de Paris à indemniser les propriétaires pour les travaux qu'il leur fallait faire pour mettre leurs maisons au niveau du Boulevard St. Denis, et ce parcequ'elle n'avait pas eu égard aux avantages que les travaux pourraient leur procurer, et qu'elle avait par là fait une fausse appréciation de l'article 1382 du Code Napoléon, et violé l'article 544 du même Code. L'article 1382 est conçu comme suit : "Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer," et l'article 544, "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements." La même Cour (cassation) avait déjà, le 18 janvier 1826, (Sir. 26, 1, 267) décidé que pour qu'il y ait lieu à indemnité, il faut que la propriété du réclamant ait subi une notable dépréciation qui ne se trouve compensée par aucun avantage.

Je crois que la défenderesse, dans les travaux qu'elle a faits et dont se plaint le demandeur, n'a exercé qu'un droit que pouvait lui accorder la Corporation de St. Sauveur, qu'elle est aux droits de cette dernière, n'a pas une responsabilité plus étendue, et qu'elle ne doit pas d'autres indemnités que celles qu'eût eu la Municipalité de St. Sauveur si elle eût fait les mêmes ouvrages.

Sans entrer dans l'examen des droits à une indemnité que peut avoir, en vertu de la loi commune, le propriétaire riverain dont la maison est enfouie ou déchaussée par les travaux de

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l'administration sur la voie publique, ni prononcer aucune opinion sur ce point important et délicat de notre droit, je pense que, dans le cas qui nous est soumis, le coût de l'exhaussement du trottoir fit-il partie de la dépréciation prouvée de la propriété du demandeur, et dût-il, à ce titre, être ajouté aux \$15.00 de travaux qu'il faut faire à cette dernière, \$35.00, les deux sommes réunies n'égale pas l'augmentation de valeur que les ouvrages dont il se plaint ont donné à sa propriété, qu'il n'avait pas raison de se plaindre, et que son action aurait dû être renvoyée.

Jugement infirmé.

Andrews, Caron & Andrews, pour le Demandeur.

C. B. Langlois, pour la Défenderesse.

Langlois, Angers & Larue, Conseils.

SUPERIOR COURT—IN INSOLVENCY.

QUEBEC, 17TH AUGUST 1877.

Coram CASAULT, J.

IN RE DINNING, Insolvent,

AND

SAMSON *et al.*, Petitioners.

Insolvent Act of 1875; and Amending Acts.

Held:—1. In the case of a claim by a firm, the names of the partners must be given in full.

2. Where an individual trades alone under the assumed name of a partnership it need not be specially stated that he has no partners, unless the plural be used to designate the claimant in the body of the claim.

3. A claim should contain a sufficient exposure of the cause of demand, within the meaning of art. 50 C. C. P., but need not allege more than an action in the Circuit Court.

4. Claims must be accompanied by the vouchers on which they are based, or by an affidavit or other evidence to justify the absence of such vouchers.

5. Secured Creditors must specify the nature of their security, and give a description of the several properties or effects, not *en bloc* but separately, and a claim not giving such description is irregular and informal and should be rejected.

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6. A claim made in Great Britain and there attested under the provisions of the law substituting attestation for an oath in certain cases, is not a proved claim under our statute, saving the case of a person objecting to be sworn for conscientious motives.

7. A power of attorney by a President, Cashier or Manager of a Bank, to a person not an employee of the Bank, is invalid in the absence of anything to show the power of those officers to grant the same.

8. A creditor who by reason of informality in his claim had no legal status at a meeting of the creditors, cannot petition against resolutions there adopted and his petition will be dismissed with costs.

9. The Judge will act under section 102, without a special reference of the case to him for that purpose, if all the documents are before him. But, held by the Court of Appeals, that, under the circumstances of this case, the judgment should have rescinded the proceedings of creditors and appointment of Assignee and Inspector, and ordered a new meeting of creditors.

Per curiam.—A writ was issued on the 27th June, 1877 and executed on the same day. A meeting was called and held on the 23rd July, at which the creditors were divided both as to the assignee and inspectors to be named. An apparent majority having carried a resolution appointing Mr. Owen Murphy, assignee and a second appointing Mr. Holt Q.C. and Mr. Webster inspectors, two petitions were presented, after regular notice to the assignee, one by the firm of John Burstall & Co., and the other by Charles Samson and others, to rescind and declare null the above two resolutions, and declare who should be the assignee and inspectors. Both petitions are substantially the same and urge the same reasons viz :—That the resolutions making the above appointments were not carried by a majority of legal votes, and that the said majority appointed Richard Henry Wurtele assignee, and William G. Wurtele and John Burstall inspectors. Burstall's petition was met by an exception *a la forme* pleaded by Owen Murphy, the assignee whose nomination it attacked, which exception was dismissed, and then by a general denial also from Mr. Murphy.

To the petition of Samson and others a demurrer and a general issue were pleaded. The demurrer was heard and reserved to the merits. The parties went to proof, and the official assignee

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who executed the writ was examined and produced all the papers. The record shows that 25 presumed creditors representing \$132,492.89 voted for the nomination of Owen Murphy as Assignee, and twenty (also presumed) creditors, representing \$46,721.61, appointed Richard Henry Wurtele.

For the inspectors, the votes appeared to be 21 for Mr. Holt and Mr. Webster, with a large majority in amount; and sixteen for Mr. Wurtele and Mr. Burstall. I reserved the demurrer but expressed my opinion that it was not founded, and that section 37 of the Insolvent Act of 1875 authorized petitions in the nature of those now disposed of. I need not repeat what I then said, and will only call attention to the wording of the section which is not limiting, but applies to all resolutions adopted by the creditors, and more so to resolutions not adopted by the creditors as defined by the law, but by the persons who had not fulfilled its requirements to enjoy the privileges and rights of creditors, and whose votes therefore could not be received or counted.

The Insolvent Act of 1875, section 102, enacts that "all questions discussed at meetings of creditors shall be decided by the majority in number and value of the creditors having a right to vote under section 2, present or represented at such meeting" and section 2, sub-section *h*, defines the word creditor to mean, in reference to proceedings at meetings in insolvency and to the right of voting, &c., a person or partnership or company whose unsecured claims to the amount of one hundred dollars or upwards have been proved in the manner provided by this Act." The right to vote is therefore given to those and to those only who have prepared, proved and filed their claims.

The claims themselves must be drawn as the law requires, or they are no claims and cannot confer any right or quality to those who made them. Now what are the formalities which should be observed and what requirements of the law complied with in the drawing of claims so that they may be considered as proved.

The law says that the claim must be accompanied by the vouchers on which it is based except when the vouchers cannot be produced, but in that case there must be an affidavit to

justify their absence, or such other evidence as may be required by the assignee. The opinion of the assignee should not be an accidental knowledge of the transaction or an anterior perusal of the document. His opinion must be what I would call a judicial opinion, grounded upon the facts then sworn to or the documents then exhibited and noted.

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This case presents instances in point where creditors brought and showed to the assignee, who copied them and annexed them to the claim, notes which were about maturing. They were not filed, but their absence is accounted for in a reasonable manner. It is also a good excuse for the non-production of negotiable paper that it is in the hands of a party who holds it either as collateral security or under discount, but then it should be so described as to be easily identified, and the name of the holder should be given so as to easily ascertain whether it is included in, and forms part of other claims.

Form P requires that the party making the claim if he be not the creditor himself should swear that he has a personal knowledge of the matter deposed to, and this is also required by section 105, otherwise his statement under oath would be ridiculous, and no proof of the existence of the claim, which must be sustained by *prima facie* evidence. The object of the law in requiring the special mention of *personal knowledge* was to prevent any party from swearing to what he had heard or been told; it should be complied with in this particular, and the claim must contain this averment.

In the case of a claim by a partnership the names of the partners composing it must be given in full, or at least their names and one of their given names. The claimant must be identified and described. It would not be sufficient to indicate an individual claimant by his initials; the name of the firm without those of its members is no better. The assignee or even some of the creditors, may have judicial proceedings to take in the interest of the estate against a claimant, either to get his claim reduced or for the delivery of securities, or for many other purposes; and without the names of the partners this could not be done. The claims which do not disclose the names of the partners are not in conformity with the Form P. They are not

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proved in the manner provided by law and they do not make of the claimant a creditor as defined by section 2 of the act.

Many of the claims by partnerships do not in this case disclose the names of the partners; they are on that ground informal, irregular and illegal, and the votes given on them rejected. I think proper to remark that what the law requires is that the names of the persons composing the partnership be given and not that, in the case of an individual trading alone under an assumed name, such as A, B and Co., he should, in his claim, specially state that he has no partners, and in all such cases when the creditor after having in the heading of his claim written "A, B and Co., claimants" states in the body of his said claim "I am the claimant" and adds "The insolvent is indebted to me, &c.," he has said all that he is bound to disclose, the law not exacting that when he trades alone he should say so: but when he trades under the supposed name of a partnership and uses in the body of his claim the plural number to designate the parties who claim and to whom the insolvent is therein said to be indebted, the judge and the assignee must of necessity presume what the words convey that there are more persons than one trading together, and, if the contrary is not specially alleged, they are bound to reject the claim as indefinite and insufficiently stated.

I now come to that part of the Form P which is in italics and as a parenthesis: (*here state the nature and particulars of the claims, for which purpose reference may also be made to accounts and documents annexed.*)

I will quote the words of Chief Justice MEREDITH in the case of *Côté*, insolvent, *Green* petitioner, and *Roy*, contesting, reported in the 1st Quebec Law Reports, p. 200. "The judges think it would be inconsistent and unjust to insist upon the production of vouchers as required by sec: 104, and at the same time not to insist upon the giving of particulars as required by the Form P., being part of the same section.

"Therefore, while we shall be careful as to the new practice to be established with respect to the filing of vouchers, we shall be equally careful to see that for the future claims shall be accompanied and explained by proper particulars which it may

be observed, can be given without any appreciable trouble. For instance if a claim be founded on a note or bill it is easy to give its date and amount and the time it has to run, and also the names of the parties; if it be for goods sold, the account in detail can be easily furnished; if for money lent, the dates and amounts of each loan ought to be given; and so in other cases."

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The language used shows that the Chief Justice then spoke in the name of the judges of the Superior Court for this district, and as I was then one of them, I need not say that I concurred in his opinion. I would say no more than that I have not altered my opinion since, if the counsel of the parties opposing the petitions had not cited this decision to argue that if the account annexed to the claim shows different heads of indebtedness, such as goods sold and delivered, money lent, and work and labor, &c., each head should be specially alleged in the body of the claim, which, if that was maintained, would soon assume the form of a general assumpsit. I do not think that the words above quoted of the Chief Justice have that meaning nor that he gave them that interpretation. I must say at all events that I did not then understand them to mean more than that the claim should refer specially to a bill of particulars thereunto annexed in which each head of indebtedness should be clearly and specially detailed. I would not under the Insolvent Act exact more in the body of the claim than in actions in the Circuit Court, where the allegation, that the defendant is indebted to the plaintiff in a sum therein mentioned for the causes and considerations stated in the annexed account, has always been taken as *un exposé suffisant des causes de la demande* (Code Pro. Art 50.) I would not even take the rule to be so rigid as to impose the rejection of those parts of the account annexed, which could not be covered by the words in the body of the claim, such as items for work and labor in an account chiefly for goods sold annexed to a claim saying that the insolvent is indebted to the claimant for goods sold and delivered as per annexed account; a case which presents itself in this present contestation, and on both sides.

Section 84 of the Act regulates that if a creditor holds security from an insolvent or from his estate he shall specify the nature and amount of such security in his claim and shall therein, on his oath, put a specified value thereon, and that the right of such creditor to vote shall be on the balance of his claim after

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deduction of the security; this last provision as to the amount which the secured creditor shall be held to represent in voting at meetings of creditors is also to be found at section 82.

The same section 84 also enacts that the Assignee, with the authority of the creditors, may consent to the retention by the creditor of the property or effects constituting such security, or on which it attaches, at such specified value, or may require from such creditor an assignment and delivery of such security, property or effects at an advance of ten per cent. upon such specified value. It seems to me clear that under the law the creditor should not only say in his claim that he holds security to an amount which he mentions, but that he must specify the nature of the security and give some description of the said security and of the several properties and effects, if more than one, which constitute the same, and that the value of the different properties and effects cannot be stated *en bloc* for all, but must be given for each. The particulars required in the statement of the claim are equally and even more essential in the enunciation of the security, for if the assignee and creditors must be well informed of the nature and extent of a claim, so as to be able to admit or contest it, they must be equally well informed of the nature and value of the security and of the different properties or effects which constitute it, to enable them to decide upon the retention of the same by the creditor or its assumption by the estate, which assumption, in the case of different properties or effects, may be of one, or several or the whole. I am of opinion therefore that a claim which does not give a sufficient description of the property and effects constituting the security and their separate value is irregular and informal and should be rejected, and the more so if, as in one instance in the present case, the creditor states the value to be so much and *more*, which more may cover the whole claim.

Section 104 requires that the claims be attested under oath, and section 105 says before whom, in and out of Canada, such oath may be taken. The law makes no exception, and a claim made in Great Britain and there attested under the provisions of the statute which substitutes attestation to swearing in certain cases, other than those where the party objecting to take an oath is allowed to make an affirmation, is not a proved claim under our statute; one is rejected on that and other grounds.

Section 29 of the Act says that "no creditor shall vote at any meeting unless present personally or represented by some person having a written authority, to be filed with the assignee, to act at any such meetings on his behalf," and the part of section 102 already cited mentions the same rule in more precise language. The authority must be conferred by persons having that power, that is the creditor himself or his agent when the latter is himself empowered to delegate his own authority, but then the authority of the agent to appoint another in his place, and that of the person whom he has chosen to represent the creditor at the meeting must both be handed to the assignee. This rule should not however, I think, be so rigidly enforced as to require from the manager of a corporation, such as the cashier or president of a bank, a special authority to represent the bank at the meeting; though, I must say, the letter of the law implies it, and it would be prudent to conform to its exigency. But to be such, the authority to any other person to represent the corporation and vote for it at any meeting must be conferred by a resolution of the board, unless the charter or the by-laws of the institution confer upon others the power to name its representatives or agents in instances such as the one under consideration.

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Several banks were in this case represented by persons holding powers of attorney signed either by the cashier, manager or president without anything to show their authority to do so. The votes so given would have been rejected for that reason if there had been no other. Other very important provisions of the law bearing upon this case must be specially noted. Section 32 of this act of 1875 has been repealed by section 11 of 40 Vic., cap. 41, and another substituted in lieu thereof, containing among other prohibitions the following: "No person shall act as the attorney or agent of any creditor upon any question as to the appointment of such person as assignee, or in reference to any claim or demand of such creditor on an insolvent estate of which such person is the assignee."

Mr. Owen Murphy, one of the two persons proposed, and for the appointment of whom as assignee the creditors were divided, held powers of attorney from ten of the creditors, represented them at the said meeting, and voted for his own appointment as assignee.

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The ten votes given for himself by Mr. Murphy, under regular powers of Attorney from the creditors, are all rejected on the motion to appoint an assignee, but this special objection could not affect the votes given by Mr. Murphy on the motions for the appointment of inspectors.

On the resolutions proposed for the appointment of an assignee and of inspectors, as already mentioned, the creditors did not agree, a number of them sustaining and voting for the motion proposing Mr. Owen Murphy as assignee, and a number of others sustaining and voting for the motion proposing the appointment of Mr. Richard Henry Wurtele—two motions were also made, one for the appointment of Messrs. Holt and Webster as inspectors, and another proposing Messrs. W. G. Wurtele and Burstall.

Both parties objected to a considerable number of votes on each side and upon each motion, but the chairman refused to entertain any of the objections and received and counted all the votes given, even, as it appears by the proceedings, that of one creditor who had filed no claim. Those who pretended they had on their side the majority of legal votes, being thereby put in minority, were naturally dissatisfied at the result and have, as above stated, applied to the judge to obtain the rescinding of the resolutions declared carried, as they allege, through an illegal majority, and to put their nominees in possession of the trust to which, as they pretend, they had been appointed by a legal majority.

The result is as follows : for the resolution appointing Mr. Murphy assignee, four votes with \$5,508 01 in value, and for Mr. Wurtele thirteen votes with \$11,571.22 in value.

The judgment therefore rescinds the resolution ; which was declared carried at the meeting notwithstanding the several objections made to the votes on each side—objections which the chairman would not decide—and Mr. Wurtele is declared to have been appointed, and to be the assignee of the estate, and, by a special provision of the law he would also be assignee if there had been a failure of nomination at the meeting.

The result of the votes on the two motions for the appointment of inspectors is as follows : For that proposing Mr. W. G. Wurtele and Mr. John Burstall, nine votes, representing a value of \$10,472.07 ; for that proposing Mr. Holt and Mr. Webster. ele-

ven votes, representing a value of \$7,841.48—so that Messrs Holt and Webster have the majority in number and Messrs Wurtele and Burstall the majority in value.

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It is the case provided for by section 102 of the Act, in the following words:—"But if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the judge who shall decide between them."

I have before me the views of the creditors and the resolutions embodying them. The judgment which I now pronounce is the statement of the true vote taken thereon, and I think it much more consonant with a good administration of justice, a prompt settlement of the difficulty, and with the interest of all the parties concerned, to decide at once between the two majorities than wait for a reference which must be made so soon as the assignee shall have resumed the possession of the papers at present before me, and then with no other possible result than to keep in suspense, for a few days more, the working of the estate, which must have already suffered from the delays caused by this litigation.

The judgment rescinds also the resolution declared carried appointing Messrs Holt and Webster inspectors, and I decide between the two majorities, that Messrs. Holt and Burstall shall be the inspectors.

Mr. Murphy and Messrs Watson Brothers, who conjointly contested the petition of Charles Samson and others, are condemned to pay the costs of the petition; and Messrs Burstall & Co. not having, at the time they presented theirs, the legal *status* of creditors, had no right to complain of the decision adopted at a meeting where they could not vote; their petition is therefore rejected with costs.

Petition rejected.

An appeal having been taken from the above by Watson Brothers, to the Court of Queen's Bench, sitting in appeal, the following judgment was rendered, on the 7th December 1877, by that tribunal. Present Hon. Sir A. A. DORION, C. J., and Justices MONK, TESSIER and CROSS. It will be seen, that although the

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judgment of the Court below is reversed, the points of practice there pronounced upon have not been questioned or disturbed, the ground of reversal being that the Judge below, instead of acting under Sec. 102, should have rescinded the proceedings of creditors and appointment of assignee, and ordered a new meeting of creditors.

Sir A. A. DORION, C. J.—This Court is of opinion that the proceedings at the meeting were so irregular that it cannot be said any proper election has been had. To maintain the judgment of the Court below would not be to do justice, for it cannot be said that the assignee and inspectors named represent the majority of the creditors, nor that they have been fairly chosen by them. The Court thinks that there is only one way to deal with such a case, and that is to annul the proceedings and order another meeting for the election of an assignee and inspectors. This is frequently done in England. *Exparte Wilson*, 1 Montague, D. & D. 234; *Exparte Spiller*, 2 M. D. & D. 43; *Exparte Edwards*, Buck. 411; *Exparte Cowe*, DeGex. 111; *Exparte Carter*, 3 DeGex. & Julius, 116.

The Court, &c., considering that the judgment in the court below, upon the petition of the respondents complaining of the said assignee and inspectors, rejected, by judgment of the 17th August last, twenty four votes of claimants representing claims to a very large amount, many of which claims had not been objected to before the vote was taken, and others were objected to on other grounds than those for which they were rejected, and in consequence of the rejection of said votes, the resolution appointing the said O. Murphy, was by the said judgment declared null and void, and the said R. H. Wurtele was declared to have been appointed assignee to the said estate, and the said C. G. Holt and Jno. Burstall were named inspectors instead of the said C. G. Holt and A. D. Webster;

And considering that the proceedings at the said meetings were irregular and that under the circumstances the Court below should have rescinded and set aside the proceedings and the appointment of the said O. Murphy as assignee, and of the said C. G. Holt and A. D. Webster, and should have ordered a new meeting of creditors to take place to appoint an assignee and inspectors to the said estate;

This Court doth reverse the said judgment of the 17th August last, and doth cancel and annul the appointment made by the said judgment of R. H. Wurtele as assignee and of C. G. Holt and Jno. Burstall as inspectors, and doth further rescind, cancel and annul the resolutions passed at the said meeting of the 23rd July last, appointing O. Murphy assignee, and the said Holt and Webster inspectors, and doth order that at a meeting of the creditors of the said Dinning to be called by the said R. H. Wurtele as interim assignee, or such meeting to be called in such other manner or for such day and place as may be ordered by a judge of the Superior Court, it shall be proceeded to the appointment of an assignee and inspectors to the said estate by the creditors who shall then have duly proved their claims as required by-law, and the court doth condemn the said respondents to pay to the appellants the costs incurred in the present appeal, and doth condemn the appellants to pay to the respondents their costs in the court below.

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Judgment accordingly.

Langlois, C. B. for Samson et al., With him, *Gibson*.

Holt, Q. C. for Watson Bros., and O Murphy.

SUPERIOR COURT—IN INSOLVENCY.

QUEBEC, 18TH SEPTEMBER 1877.

Coram CASAULT, J.

IN RE DINNING, Insolvent,

AND

WURTELE *et al.*, Petitioners.

INSOLVENCY—MERCHANT SHIPPING ACT—INJUNCTION.

Held:—That under section 36 of the Canadian Merchant Shipping Act, the remedies provided by section 65 of the Imperial Act, are extended to vessels building in Canada while in course of construction.

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That the powers conferred upon the Court by the said section as so extended may be exercised by a judge at chambers, and he may grant an injunction prohibiting any transactions affecting the vessel, for any period within his jurisdiction.

That under the circumstances of this case the judge would grant the injunction prayed for.

The High Court of Admiralty has the same powers over a British ship as are conferred upon the High Court of Chancery by sections 62 to 65 of the Merchant Shipping Act 1854, but this jurisdiction has not been extended to Courts of Vice-Admiralty, and belongs in Canada exclusively to the highest Court of original jurisdiction.

Section 68 of the Insolvent Act requires, in order that a creditor may take proceedings in his own name, first a demand upon and refusal by the assignee to take the proceeding, and then the permission of a judge to do so; *Held*, that such conditions are to enable the creditor to secure for himself all the advantages derived from these proceedings; but by the common law any creditor may take, at his own risk, in the common interest of the creditor, all such proceedings as will tend to bring into the common fund anything which it is attempted to direct from it, and there is nothing in the insolvent law differing from the common law on this point.

Per curiam.—This is a petition by C. & W. Wurtele, creditors, for an order to prohibit all transactions respecting the ship No. 47, also called the *Lorenzo*, mortgaged to Watson Brothers as security for advances for its construction.

The petition alleges that, at a meeting of creditors held on the twenty-third day of July last past, Mr. Owen Murphy was declared assignee by means of illegal votes and his nomination annulled by a Judgment rendered, on the seventeenth day of August, which declared that Mr. Wurtele, the official assignee who executed the writ, had been legally elected and that he was the assignee to the estate; That the said Mr. Owen Murphy, the insolvent and Watson Brothers were in possession of the said ship or vessel and refused to give it up to the said R. H. Wurtele; That the latter had taken out a seizure in revendication, which the said Owen Murphy, the insolvent and Watson Brothers had prevented from being executed by refusing the bailiff who held the writ admittance to the ship-yard, but that the said vessel had been seized on the morning of the eighth of September after having been launched; That the said vessel was mortgaged to the said Watson Brothers on the seventeenth day of January last past; That they the petitioners have reason to believe that goods, sold by them to the said insolvent and not paid for, have

been used in the construction of the said vessel ; That the said Owen Murphy and the insolvent Dinning have given to said Watson Brothers, since the insolvency, materials to the amount of \$1,900, and that they have reason to believe that some fraud is about to be committed against the other creditors and that the said Watson Brothers assisted by the said Owen Murphy and Dinning will have the said vessel enregistered in their name with the right of sale; they conclude by asking for an order to prohibit all transactions upon the said vessel.

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Watson Brothers answered this petition by a general denial and a special plea alleging that the said Owen Murphy had been legally appointed assignee and that the Judgment holding the contrary had been appealed from to the Court of Appeals, that they had never done or wished to do any thing to injure the other creditors, but that what they had done was merely to secure the rights conferred upon them by the mortgage mentioned in the said petition. In conclusion they ask that the order be revoked and rescinded.

Each of the others, Mr. Murphy and Mr. Dinning, produced a general denial and asked that the petition be dismissed. After the examination of several witnesses the parties were heard and several objections were raised against the issuing of the order and its further continuance.

1st. That the Petitioners as creditors had no right to make such a demand as contained in their petition and that the assignee is the only one having such right.

Section 68 of the Insolvent act of 1875 requires, in order that a creditor may take proceedings in his own name, first a demand upon and refusal by the assignee to take the proceeding; and then the permission of the Judge so to do; but the conditions are only in order to enable the creditor to secure for himself all the advantages derived from these proceedings. By the common law, any creditor may take, at his own risk, in the common interest of the creditors all such proceedings as will tend to bring into the common fund anything which it is attempted to divert from it. I find nothing in the insolvent law differing from the common law on this point.

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I am even of opinion that the right of a creditor to make such a demand is to be found in sec. 37 of the same insolvent act, which allows a creditor for \$500 and upwards who is dissatisfied with the acts of the assignee with regard to the disposal of the whole or part of the estate or with regard to the administration of the estate, to apply to a judge to rescind the resolutions or orders which he wishes to have revoked. The law fixes certain delays it is true, but they only commence to run from the time when the acts have come to the knowledge of the creditor. In addition to this, the petition now before us is nothing more than a conservatory act asking for an order prohibiting the violation of common rights and interests—an order that can only suspend the execution of an act without attacking it.

2nd objection : No jurisdiction. This objection subdivides itself into two others.

1. That sec. 65 of the merchant shipping act under which the petitioners are proceeding is only applicable to registered vessels.

2. That the injunction it provides can only be granted by the Court and not by a judge in chambers.

Section 65 is in these words :

" It shall be lawful in England or Ireland for the Court of Chancery, in Scotland for the Court of Session, in any British possession for any Court possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such Court may possess, upon the summary application of any interested person made either by petition or otherwise, and either *ex parte* or upon service of notice on any other person, as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case requires; and every registrar, without being made a party to the proceedings, upon being served with such order or an official copy thereof, shall obey the same."

It treats of registered vessels only, and a vessel cannot according to the Imperial law be registered before it is built.

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But the Imperial Act, sec. 547, allows the colonial legislatures to change these clauses, provided they observe certain formalities therein given.

The Federal Parliament has changed the clauses relating to the registration of vessels by the 36 Vict. c. 128, which was passed in accordance with the terms of sec. 547 of the Merchant Shipping Act, and came into force on the 7th March 1874, after having been sanctioned by the Queen. This act, by the 36th and following sections has allowed the provisional registration of vessels in course of construction and the granting of mortgages upon them, with the same power of sale by the mortgagee, and transfer of his mortgage, which is given him after the regular registration of the vessel by the imperial act, and provides that the mortgages thus granted, and which have not been discharged before the final registration, shall be presented and entered in the register book. This registration, giving as regards the sale of vessels in course of construction, powers and rights as great and as susceptible of abuse as the final registration after completion, necessitates the extension of the salutary clauses of section 65 of the Imperial act to the analogous cases that it has created.

2. Section 65 gives to the Court alone the powers which it confers. From this it is argued that these powers cannot be exercised by a judge in chambers. It is only necessary to read the section to understand that, as the nature of the order is to hinder the making of an entry upon the register which cuts off and puts an end to the rights of third parties, the issuing of such an order requires a despatch which could not be obtained at the regular sittings of the Superior Court considering their distant intervals, and that, if it was necessary to wait for the sitting of the Court to obtain the remedy given by the law, it could seldom indeed be applied in time, or before that which it was intended to hinder and prevent had actually been accomplished. The prohibition to make any entry upon the register is in the nature of affixing seals (*scellé*) and requires equal despatch, and appears to me to be included in the powers of the Court which, by the Con. Stat. of Lower Canada, cap. 28 sec. 28, may be exercised by a judge in vacation and out of term as well as in term, and during the sit-

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tings of the Court; with this distinction that when exercised by a judge in vacation his decisions may be revised by the Court.

3rd objection. That the seizure in revendication, which the petitioners allege has been taken by R. H. Wurtele, secures to the creditors their rights and recourse, and that the remedy provided by the said section 65 of the Imperial Act only applies in cases where the parties have no other means of protecting their rights.

This seizure does not prevent the transfer of the mortgage or the sale of the vessel by the mortgagee, and could not affect the rights of the purchaser, nor hinder his taking possession and enregistering the vessel in his own name. The rights of the creditors of the Insolvent upon this vessel exist only so long as it forms part of his general assets. The insolvency of the builder according to section 43 does not affect and does not limit the rights of a mortgage creditor whose mortgage is registered.

4th objection. That the petitioners have another remedy.

If I had been able to find any other recourse open to the petitioners, I would have refused the present application, whose exceptional character should limit its use to cases as exceptional as the remedy. In England the jurisdiction conferred by section 65 of the act, which now belongs to all the divisions of the High Court of Justice there, was specially given to the Court of Admiralty by the act 24 Vic., Cap. 10, Sec. 12.

“The High Court of Admiralty shall have the same powers over any British Ship or any share therein as are conferred upon the High Court of Chancery in England by sections 62 to 65 inclusive of the Merchant Shipping Act, 1854.”

Neither the act 26 Vict., Cap. 24, Vice Admiralty Courts Act 1863, nor any subsequent act, has extended this jurisdiction to the Courts of Vice Admiralty. It belongs exclusively in this country to the highest Court of original jurisdiction, to which it was given by the Merchant Shipping Act of 1854.

5th objection. That there is no ground for the application.

At a meeting of creditors held the 23rd July 1877, the said Owen Murphy was declared elected assignee by a majority of

five in number. Ten of the votes recorded in his favour were given by himself. Notice was given to the assignee within twenty-four hours under section 37 of the Insolvent Act of 1875, and a petition attacking his appointment was presented within the forty-eight hours following; and while meeting this petition by a demurrer and delaying its decision by other means, and contesting it jointly with Watson Brothers, he agreed on the thirty-first of July to abandon to Watson Brothers materials to the value of about \$4,000.00. Judgment was rendered on the 17th August declaring his election null and an appeal was taken from this judgment by Watson Brothers alone, and not by O. Murphy. Mr. Murphy, who admits in his deposition that the votes which he gave for himself were illegal, and that the act of voting for himself was "*an illegal act committed in a stupid, innocent manner*," and thereby admits that he was not named by a legal majority in number and in amount, and who, not having appealed from the judgment rendered against him, should clear his hands of the estate, persists nevertheless in keeping possession of the property, and in upholding a contract made as he himself says, without consulting anybody as to the rights of Watson Brothers to the things which were given over to them, and by which, seven days after his appointment, and when that appointment was contested before the Courts, he gave to Watson Brothers, materials in the ship-yard of the value of about \$4,000, besides the use of the ship-yard, tools and plant, and the services of the book keeper; foreman and watchman *gratis* (I do not now allude to the materials which Watson was allowed to take at cost price), and this agreement made in consideration that Watson Brothers should renounce all claim against the estate for their advances upon the vessel. These advances, including commission and interest, amounted to about £6,900.0.0. The Watsons have produced a claim, in which they value their security, viz a mortgage upon the ship, at £5,000; leaving a balance of £1,900, which at 15 cts. in the dollar, which by the proof made on this petition appears to be the dividend they have agreed to accept, amounts to \$1,386.00. Dinning estimates as high as \$2,900 the value of that portion of the materials given over to the Watsons, which is still due to the creditors from whom they were purchased, and these unpaid-for materials appear to form a trifle more than half of those given over to Watson Brothers. Mr. Murphy consulted, it is true, two men of

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experience, Captain Dick and Mr. Davie, as to the expediency of the handing over to Watsons of these materials, the use of the yard, &c., but after his having told them that all the materials enumerated were pledged to Watsons as well as the ship itself, they could give no other advice than to surrender these things to the pledgee.

The reason or excuse given is that the vessel, in remaining upon the stocks, was losing considerably in value; but for every dollar of diminution in value, Watson Brothers were losing 85 cents and more; for the greater their claim against the estate the smaller would have been the dividend it could pay, and it seems as already mentioned to yield only 15 cents in the dollar.

It is impossible for me, then, not to see in this vote given, in the transaction in question, in this persistent retaining possession of the estate, in this making common cause with Watson Brothers and in the means taken by Watson Brothers to hinder the execution of the judgment declaring another assignee appointed, a line of conduct adopted to sacrifice to Watson Brothers the interests of all the other creditors and not to give to the latter the protection that the petitioners seek for them.

The order prohibiting all transactions as to the ship is maintained and continued until the 1st December next, unless Watson Brothers give security to the amount of \$4,000 to meet any Judgment which may be rendered against them for the payment of the value of the materials handed over to them by Mr. Murphy. I cannot embody in this judgment that upon giving this security Watson Brothers shall obtain the release of the ship from the *saisie revendication* taken by the assignee R. H. Wurtele, but the parties will understand it, and I have no doubt that upon the security being given, they will grant this release, which otherwise may be granted by a judge of this Court.

Petition granted.

Langlois, C. B., for Petitioners. With him *Gibson*.

Holt, Q. C., for Respondents. *Cook*, for Insolvent.

This judgment was confirmed by the Court of Queen's Bench, appeal side, on the 7th December 1877.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC, 1878.

No. 148.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

BERNIER et CARRIER.

ACTION PERSONNELLE—ACTION HYPOTHÉCAIRE—NOVATION.

JUGE:—1° Que l'intervention d'un donateur, créancier d'une rente viagère affectant un immeuble, à un acte de vente du dit immeuble (acte par lequel il aurait accepté le paiement des intérêts du prix de vente à la place des articles de sa rente) n'opère pas novation de sa créance.

2° Que le donateur pouvait exercer l'action hypothécaire en vertu de l'acte de donation, aussi bien que l'action personnelle en vertu de l'acte de vente.

Sir A. A. DORION, J. C.

Cette contestation a eu lieu sur une action hypothécaire portée par l'intimée contre l'appelant pour la somme de \$108, balance due sur arrérages de rente viagère.

Le 12 juillet 1862, l'intimée a donné deux immeubles à son fils Napoléon Boulé, qui s'est chargé de lui payer une rente viagère. Boulé a vendu ces deux immeubles à l'appelant pour \$2000, par acte du 10 janvier 1870. Par cet acte de vente l'appelant s'est chargé de payer l'intérêt du prix de vente à l'intimée pour lui tenir lieu de sa rente viagère. L'intimée a consenti par un écrit séparé à accepter cet intérêt. Plus tard l'appelant du consentement de l'intimée a payé à Boulé \$1200 à compte de son prix de vente. Il a aussi payé \$150 à l'intimée à compte des intérêts qu'il lui devait le 10 janvier 1875, et c'est pour la balance de ces intérêts, se montant à \$108, que l'intimée a poursuivi par action hypothécaire l'appelant comme détenteur des immeubles qu'elle a donné à son fils.

L'appelant a plaidé qu'il ne devait pas toute la somme demandée ; que de plus, par l'acte du 10 janvier 1870, il y avait eu novation de la créance de l'intimée, et que l'appelant étant dès

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lors devenu son débiteur personnel, il n'y avait pas lieu à l'action hypothécaire.

Cette prétention de l'appelant est mal fondée. L'intimée a consenti à prendre une somme fixe au lieu des articles de rente que devait lui payer son fils. Elle n'a pas renoncé à l'hypothèque de bailleur de fonds qu'elle avait sur les immeubles donnés à son fils, et quoique l'appelant soit, à raison de l'obligation qu'il a contracté par l'acte de 1870, devenu le débiteur personnel de l'intimée (Art. 1029 C. C.), elle n'a pas pour cela perdu son hypothèque privilégiée de bailleur de fonds. Elle pouvait porter une action personnelle en vertu de l'acte de 1870, mais elle pouvait également porter une action hypothécaire en vertu de l'acte de donation de 1862. Elle pouvait intenter une action personnelle, ou une action personnelle et hypothécaire en même temps, ou seulement une action hypothécaire. En renonçant à l'action personnelle qu'elle pouvait exercer, elle renonçait à un droit qu'elle avait, sans nullement causer de préjudice à l'appelant.

Cette question a été formellement jugée à Montréal par M. le Juge PAPINEAU dans une cause de *LeBrun vs. Béland*, comme elle l'avait été par M. le Juge BERTHELOT dans une cause de *Leclerc vs. Filion*, 7 *Revue Légale*, 428, et ces décisions sont autorisées par les principes les plus incontestables.

La prétention que l'appelant a payé tous les arrérages qu'il devait moins \$48, n'est pas soutenue par la preuve.

Il y a cependant dans le Jugement une erreur en ce que l'appelant a été condamné à délaisser, si mieux il n'aimait payer \$800 au lieu de \$108 qui était la somme demandée. Comme ce n'est qu'une erreur cléricale, j'aurais été d'opinion de la corriger sans accorder de frais. La majorité étant d'opinion que vû que l'intimée ne s'est pas désistée de cette partie du Jugement, elle doit payer les dépens de l'appel, le Jugement sera réformé dans ce sens.

Taschereau & Fortier, pour l'Appelant.

Bossé & Languedoc, pour l'Intimée.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC, 22 DÉCEMBRE, 1877.

No. 179.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

MOISAN et ROCHE.

GARDIEN—SAISIE-REVENDEICATION.

JUGÉ :—Que le gardien qui a perdu la possession des objets mis sous sa garde, peut les réclamer par voie de saisie-revendication.

Sir A. A. DORION, J. C.

Le 21 septembre 1875, l'appelant a été nommé gardien d'une quantité de bois saisi en vertu d'un bref de saisie-arrêt avant jugement, dans une cause de *Bergeron vs. Cockburn et autres*.

Ce bois fut saisi sur le fleuve, près du quai de l'intimé, qui fut le même jour informé de la saisie. L'intimé ayant le 23 septembre, malgré les défenses de l'appelant, pris possession du bois en le faisant mettre sur son quai, l'appelant en sa qualité de gardien prit une saisie-revendication pour recouvrer le bois dont il avait la garde. L'intimé s'est alors inscrit en faux contre le procès-verbal de saisie fait dans la cause de *Bergeron*, prétendant qu'il n'y avait pas eu de saisie. Sur cette inscription de faux la Cour Inférieure a déclaré fausse la partie du procès-verbal où l'huissier disait avoir saisi le bois en la possession des défendeurs, sans cependant annuler la saisie. Au mérite, la Cour Supérieure présidée par M. le Juge CASAULT, a maintenu la saisie-revendication faite à la poursuite de l'appelant, et la Cour de Révision composée de M. le Juge en Chef MEREDITH et de MM. les Juges STUART et CARON, a infirmé ce Jugement, M. le Juge en Chef différant de la majorité de la Cour.

Cette cause ne présente qu'une question de droit.

Le gardien qui a perdu la possession des objets mis sous sa garde, peut-il les réclamer par saisie-revendication ?

Il a été jugé à Québec, par la Cour de Révision, le 30 novem-

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Roche.

bre 1875, dans une cause de *St. Cyr vs. Paquet*, que le gardien n'avait pas un tel recours.

A Montréal, il avait été jugé en 1868, dans une cause de *Mallette vs. Whyte*, 12 L. C. J., page 229, que le gardien peut exercer la revendication.

La même chose y a été jugée dans la cause de *Coindet vs. Gilbert*, maintenant devant cette cour.

Dans ce conflit il faut recourir aux autorités.

Le gardien est un séquestre (Art. 1823 et 1825 Code Civil). Il est aussi un dépositaire judiciaire (Art. 560 du Code de Procédure Civile). Il a le droit d'enlever les effets saisis pour les tenir sous sa garde (Art. 562) et il peut être contraint même par corps à les représenter (Art. 597).

La loi n'a pas pu lui imposer une responsabilité aussi rigoureuse sans lui donner les moyens de se protéger. Aussi l'Ord. de 1667, Tit. 19, Art. 17, dont la disposition a été reproduite par l'Art. 600 du Code de procédure français, ordonnait des poursuites criminelles contre ceux qui enlevaient ou détournaient des effets saisis, et ce sans préjudice des autres poursuites extraordinaires.

Parmi ces poursuites extraordinaires il faut placer la revendication.

Serpillon sur l'Art. 15 du même titre dit : "Si une partie saisie s'avisait de vendre quelques uns de ses meubles qui n'auraient pas été déplacés, le saisissant et même le gardien auraient droit de suite sur ces effets pour les faire rétablir."

Carré, T. 4, Art. 600, Quest. 2059, dit également : "Quant aux enlèvements et détournements, les auteurs en seront poursuivis criminellement sur la plainte, soit du saisissant, soit du gardien, qui ont trois ans (Art. 2279 du Code Civil) pour la recherche et la réclamation des effets soustraits, comme l'a jugé la Cour de Rennes, le 11 juillet 1814, Journal des Avoués, T. 19, p. 458, et ainsi que l'enseigne Thomine, T. 2, p. 116."

Thomine DesMazures, à l'endroit cité, s'exprime ainsi :

“ C'est sur la plainte du gardien que le ministère public
 “ provoquerait l'application des peines contre ceux qui par voie
 “ de fait auraient enlevé les effets saisis ”

Moisan
 et
 Roche.

“ Mais que fera le gardien, si sa vigilance a été trompée ?
 “ Il doit, dans son intérêt, faire le plus promptement possible la
 “ recherche des auteurs de l'enlèvement et du lieu où les objets
 “ sont reportés ; *il a trois ans pour revendiquer les objets s'il découvre*
 “ *où ils sont* (Code Civil, Art. 2279) ; *il présentera requête en revendi-*
 “ *cation* conformément à l'Art. 826 du Code de Procédure.”

Des autorités aussi précises semblent ne laisser aucun doute sur le droit de suite ou de revendication que le gardien peut exercer.

Les auteurs ne distinguent pas si les effets ont été déplacés ou non. Dans les deux cas le gardien est responsable des effets saisis et il a le droit de se protéger. Il n'a pas non plus à s'occuper si la saisie est valable ou non. Etant dépositaire judiciaire, il est tenu envers le saisissant et le saisi, si la saisie est valable, et envers le saisi seul si elle est nulle. Il n'a rien à voir au débat qui peut s'engager entre le saisissant et le saisi, ou leurs créanciers sur la validité de la saisie. Son rôle est passif ; il attend le résultat du procès pour remettre les effets saisis selon l'ordre qui lui en sera donné.

La majorité de la Cour est d'opinion que la demande en revendication de l'appelant est bien fondée, et que le Jugement de la Cour de Revision doit être infirmé et celui de la Cour Supérieure confirmé.

M. le Juge TESSIER et M. le Juge CROSS diffèrent.

Andrews, Caron & Andrews, pour l'Appelant.

Ross & Stuart, pour l'intimé.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC 22 DECEMBRE 1877.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J. CROSS, J.

GILBERT et COINDET,

GARDIEN—SAISIE-REVENDEICATION.

Jugé :—Que le gardien qui a perdu la possession des objets mis sous sa garde, peut les réclamer par voie de saisie-revendication.

Sir A. A. DORION, J. C.

Cet appel est d'un jugement rendu à Montréal, sur une saisie revendication faite à la poursuite d'un gardien dépossédé. Il n'y a de différence entre cette cause et celle de *Moisan et Roche* qu'en ce que la Cour Supérieure qui a jugé cette cause à Montréal, a maintenu la saisie revendication du gardien.

La majorité de la cour est d'opinion que ce jugement doit être confirmé.

M. le Juge TESSIER et M. le Juge CROSS diffèrent.

SUPERIOR COURT, QUEBEC.

7TH DECEMBER, 1876.

No. 1498.

Coram DORION, J.

CALLAGHAN vs CORPORATION OF ST. GABRIEL WEST.

HELD :—That a corporation, having passed a by-law to open a road over a person's property, and resolutions to carry into Review a judgment against its laborers sued for trespass in the execution of such by-law, is liable for any damage incurred by them at the suit of the proprietor claiming to have been injured by the opening of such road in an illegal manner and without observing the formalities required by the Municipal Code.

The plaintiff's action was brought to recover \$760.00,

namely, \$400.00 for damages, and \$360 for the amount of a judgment rendered against him at the suit of one Holton, and costs thereon.

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v.
Corporation
of St. Ga-
briel West.

The declaration set forth that in June, 1875, plaintiff had been employed as laborer by John Berry, road inspector for the defendant, to open up a new road across Holton's property, in the said parish; that Holton had sued him for trespass; that the Mayor and Council obtained his copy of writ and summons, and handed them over to their own attorneys, to have the suit contested; that judgment was rendered against Callaghan on the 19th of February, 1875, for twenty dollars damages, and costs in an action of \$100, on the ground that the by-law and proceedings were illegal; that the municipal council thereupon passed a resolution at a special meeting on the 24th February, 1876, to have the case carried to the Court of Review, where the judgment was reversed, with costs of both Courts against Holton, who then appealed to the Court of Queen's Bench, which confirmed the original judgment of the Superior Court, with costs of that suit, and those of review and appeal against Callaghan. The principal and costs amounted to \$360, which, together with \$400 for damage suffered by him otherwise, Callaghan now claimed from the Corporation.

The defendant admitted the main facts of the case, and that the Mayor had obtained the copy of writ from Callaghan, leaving the damages to the discretion of the Court. Minutes of a meeting held on the 24th February 1875, containing resolutions to carry the case into the Court of Review, and instructing counsel to take the necessary steps, were filed in the case; also resolutions passed at a meeting held in June following, declaring the proceedings of the former meeting null, in consequence of an error in the service of the notice on one of the councillors.

The defendant pleaded in law that the plaintiff claiming to be indemnified for certain consequences of acts done by the authority of defendants, had not alleged or shewn that they were authorized by resolution, the only legal way; that the acts were illegal in themselves and therefore without indemnity; that the defendants had acted *ultra vires* in taking part in proceedings between Holton and Callaghan, and gone beyond the scope of their functions as a corporate body.

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briel West.

It was urged at the hearing that the action should have been brought in warranty.

The Court overruled defendants' pretensions, but allowed damages only to the amount for which the plaintiff had been condemned in favor of Holton.

Judgment in plaintiff's favor for \$260.00, reserving his recourse for the costs of seizure, which were not determined, and for those of his lawyers, in the event of his being called upon to pay them, the whole with costs of suit against defendants.

Molony, for Plaintiff; *Bédard*, with him.

Dunbar, Q. C., for Defendants.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC, 1877.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 2. FIOLA et HAMEL.

No. 4. GAGNON et HAMEL.

CAUTIONNEMENT EN APPEL.

JUGÉ :—1° Un jour additionnel d'avis n'est pas nécessaire pour chaque cinq lieues de distance, lorsqu'il s'agit de donner un cautionnement en appel.

2° Lors d'un cautionnement en appel pour les frais seulement, le consentement donné par le procureur de la partie à ce que le jugement de la Cour Inférieure soit exécuté suffit.

3° Une seule caution hypothécaire suffit.

Sir A. A. DORION, J. C.

Des motions ont été faites pour renvoyer les appels dans ces deux causes :

1° Parceque les avis que les appelants donneraient caution pour appeler n'ont été signifiés, ni à l'intimé, ni à ses procureurs.

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Gagnon et
Hamel.

2° Parceque les avis ayant été signifiés à Québec, et le cautionnement fourni à Montmagny, à plus de cinq lieues de distance, les appelants devaient donner un jour additionnel de délai.

3° Parceque les appelants n'ont donné caution que pour les dépens, et qu'ils n'ont signé eux-mêmes aucun consentement que le jugement fût exécuté nonobstant l'appel.

4° Parceque les appelants n'ont fourni qu'une seule caution.

Les procureurs de l'intimé étaient MM. Langlois & Angers, et l'avis de cautionnement a été signifié personnellement à M. Angers, l'un d'eux. La signification à l'un de plusieurs procureurs suffit, ainsi que cela a été jugé dans plusieurs causes. *Dawson vs. Desfossés*, jugée le 2 septembre 1875. *Lainesse vs. LaBonté*, décembre 1875.

Il n'y a rien dans le Code de Procédure, ni dans les règles de pratique, qui exige un jour additionnel d'avis pour chaque cinq lieues de distance, lorsqu'il s'agit de donner un cautionnement en appel. Cette règle ne s'applique qu'aux assignations en première instance.

Il a déjà été décidé dans une cause de *Brooke vs. Dallimore*, 21 décembre 1875, que le consentement donné par le procureur de la partie à ce que le jugement fut exécuté suffisait. En effet le procureur, en consentant à ce que le jugement soit exécuté ne confère aucun droit à la partie adverse. Le jugement serait exécutoire sans ce consentement. Le procureur ne fait là qu'un acte nécessaire pour rendre valable le cautionnement qu'il a été autorisé à donner pour les frais. Ce consentement ne porte aucun préjudice à l'appelant, puisque le cautionnement serait inutile sans ce consentement.

La quatrième objection que les appelants n'ont fourni qu'une caution est également mal fondée.

L'art. 1124 exige que les appelants donnent bonne et suffisante caution.

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Hamel
Gagnon et
Hamel.

L'acte d'interprétation (31 Vict. ch. 7, s. 2, ss. 24) déclare que le mot cautionnement veut dire bonne et suffisante caution, et qu'une seule caution suffit, à moins que deux cautions ou plus ne soient expressément requises.

L'art. 1145 déclare qu'une seule caution propriétaire d'immeubles suffira pour les appels de la Cour de Circuit, et l'acte 34 Vict. ch. 4, s. 14, a établi la même règle pour les appels au Conseil Privé. S'il suffit d'une seule caution hypothécaire pour appeler au Conseil Privé d'un jugement de la Cour du Banc de la Reine, une seule caution doit également suffire pour appeler d'un jugement de la Cour Supérieure à la Cour du Banc de la Reine.

Dans la cause de *Dawson vs. Desfossés*, 2 septembre 1875, l'appel a été rejeté parcequ'il n'y avait qu'une caution et qu'elle n'avait pas donné d'hypothèque sur ses immeubles. Le cautionnement fut déclaré insuffisant.

Ici cette difficulté ne se présente pas. La caution a hypothéqué ses immeubles, et l'intimé n'a pas établi que cette hypothèque soit insuffisante pour répondre des dépens.

Les deux motions doivent être renvoyées.

John Gleason, pour les Appelants.

Langlois, Angers & Larue, pour les Intimés.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

QUEBEC, 7TH DECEMBER 1877.

No. 56.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

MCGREEVEY vs. VANASSE,

OBLIGATION—EVIDENCE.

Action by Respondent to recover first instalment of \$3,000 on obligation to pay \$18,000, as being a claim against the North Shore Railway Company, of which Appellant was contractor. The respondent was to obtain a resolution from the directors of the company, acknowledging the debt. By his action he averred that the appellant had rendered it impossible for him to obtain this resolution, in as much as he abandoned his contract with the company, which had ceased to exist, the Provincial Government having assumed the line and made a new contract with appellant, by which the latter was to pay all the debts of the extinguished company.

Held:—(reversing the judgment of the Superior Court) that without proof of the debt, Respondent could not recover.

The following are the motifs of the judgment rendered in the Superior Court by Hon. Justice CASAULT, and appealed from :

“ Considérant qu'à la date de l'obligation dont le demandeur réclame la première échéance par son action en cette cause, lui dit demandeur avait contre la Compagnie du Chemin de fer du Nord une réclamation pour services formellement reconnus par le bureau de direction de la dite compagnie, mais dont elle n'avait pas déterminé le montant, et que dès avant cette première échéance la dite compagnie avait, avec le consentement du dit défendeur, cédé et abandonné tous ses droits et toutes ses obligations au Gouvernement de la Province de Québec, et que le dit défendeur avait, par conventions spéciales avec le dit gouvernement, assumé toutes les dettes de la dite compagnie pour ouvrages faits, services rendus et matériaux fournis, ainsi que toutes les autres dettes de la dite compagnie trouvées justes par les commissaires qui devaient être nommés en vertu d'une loi en contemplation qui a subséquemment et avant la dite échéance été adoptée par la Législature de la Province de Québec, et et par laquelle la dite Compagnie du Chemin de fer du Nord a cessé d'exister, et le contrat susdit du dit défendeur avec le gouvernement été confirmé.

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Vauasse.

“ Considérant que cette loi et le contrat entre le gouverne-
 ment et le dit défendeur ont rendu impossible l'adoption par
 • “ le bureau de direction de la dite compagnie de la résolution
 “ mentionnée dans la dite obligation, et que depuis, le dit défen-
 “ deur est sans intérêt dans l'adoption de la dite résolution, aussi
 “ bien que dans la détermination du montant auquel le deman-
 “ deur a droit pour les services qu'il a rendus à la dite compa-
 “ gnie, l'exception du dit défendeur est renvoyée et lui dit dé-
 “ fendeur est condamné à payer au dit demandeur trois mille
 “ piastres, avec intérêt à compter du dix août mil huit cent
 “ soixante-seize, et les dépens.” •

Sir A. A. DORION, C, J.

On the 13th April 1875, the respondent transferred to the appellant a claim of \$25,000 on the North Shore Railway Co., the consideration stated in the transfer being one dollar. On the same day the parties entered into an agreement by which after reciting the terms of the transfer the appellant acknowledged to owe to the respondent the sum of \$18,000 being the true consideration of the transfer, payable \$3,000 in 1875, \$6,000 in 1876 and the balance in 1877. And in consideration of this the respondent promised to have passed by the board of directors of the North Shore Railway Co., a resolution to the effect that the appellant would have a right to deduct out of the \$100,000 payable by him to the company under the terms of his contract, whatever sum or sums might be awarded by the company to the respondent on account of his claim.

The respondent has sued for the 1st instalment of \$3,000 of this claim alleging that appellant rendered it impossible to procure the resolution which he promised to obtain from the company, by the fact of the appellant having given up his contract and made another one with the Government, and that he is in the same position as if the resolution had been passed.

• The appellant contested this demand by alleging that respondent had no claim at all against the North Shore Railway Co., and that he had not procured the required resolution.

The evidence shows that by his contract with the company, the appellant was bound to pay to the company \$100,000 to pay claims approved by the board of directors ; that the company

transferred all their rights and property to the Province of Quebec, and that appellant entered into a new contract with the government on the 24th of September 1875, by which he agreed to pay all the debts of the company approved by the board of railway commissioners. These transactions were sanctioned by an act of the provincial legislature passed on the 21st of december 1875.

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On this evidence the Superior Court condemned the appellant to pay the \$3,000 claimed.

The *motivés* of the judgment are 1st. that respondent's claim for services was formally recognised by the board of Directors of the company without determining its amount—2nd. that the company, with the assent of the appellant has abandoned its rights to the government of the Province of Quebec, and that by a special agreement with the government, appellant assumed all the debts of the company, which might be approved of by the Railway Commissioners, and that at the passing of this act which confirmed these arrangements, the company ceased to exist—3rd. That this act and the contract of appellant with the government have rendered impossible the passing of a resolution by the board of Directors of the company.—4th. that appellant has no interest in having such resolution passed, nor in having the amount determined.

The first motive is based on an erroneous statement of fact. The board of Directors have not recognised the claim of the respondent for services, but the executive committee of the board have on the 13th of January 1875, long before the transfer, acknowledged that respondent had rendered services to the company and recommended him to the consideration of the company. On this recommendation, which was not the admission of a claim, the board never acted.

The second motive assumes that the changes in appellant's contract and his assent to the transfer the company made to the government, has altered the obligations of the respondent under the agreement of the 13th of April 1875. These changes have only substituted the provincial government to the company, and the appellant who, under his contract with the company, was bound to pay the debts of the company which would be appro-

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ved of by the Directors, to the extent of \$100,000, became bound to pay all the debts of the company which would be approved of by the Railway Commissioners; but he did not thereby assume to pay the claim of the respondent, if it was not due. The payment of this claim by the appellant rested after the change had taken place on the terms of agreement of the 13th of April, 1875.—3rd. The respondent had from the 13th of April to the 24th of December 1875 to obtain the approval by the Board of Directors, for it was only by the passing of the act transferring the railway from the company to the government that the Directors ceased to have any authority to act—and even, after that period, the respondent could have obtained the sanction of his claim by the Railway Commissioners who to all intents and purposes were by act of Parliament substituted to the Directors of the company for the prosecution of the works, and for the determining of the amount of claims against the company. It was not therefore impossible to have the respondents claim recognised substantially as provided by the agreement.—The last motive is that the appellant has no interest in having a resolution passed, or in having the amount of the claim determined. His interest is as great now as it was when the agreement was made. By the transfer and agreement which must be taken together, the respondent transferred to appellant a claim of \$25,000 for \$18,000. Although there was no guarantee stipulated, this transfer was subject to the legal guarantee that the total amount was due by the company (art. 1576 C. C.,) so that if none of it was due by the company, the appellant was not bound to pay any portion of the consideration for which the transfer was made, and if only a portion of it was due, then the appellant was entitled to retain a corresponding proportion of the consideration or price of the transfer. The appellant has, it is true, bound himself to pay all the debts of the company which would be approved of by the Railway Commissioner, but if this claim is not a debt of the company, he is not bound to pay it in virtue of his contract with the government, nor is he bound to pay to the respondent the price he promised for it under the agreement of the 13th of April 1875; hence the interest he has in exacting the fulfilment of the condition that the respondent should procure a resolution approving of the claim.

On the whole I think the Judgment ought to be reversed

and the action of the respondent dismissed *quant à présent*, reserving to him any recourse he may have against the appellant upon the said agreement of the 13th April 1875.

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v
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Andrews, Caron & Andrews, for Appellant. *Holt, Q. C.*, Counsel.

Jules E. Larue, for Respondent. *H. T. Taschereau, Q. C.*, Counsel.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC, 1878.

No. 189.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

DUFRESNE et DUBORD.

DONATION—ENREGISTREMENT.

Jugé :—1° Qu'un donateur qui fait enregistrer son acte de donation conserve son hypothèque privilégiée de *bailleur de fonds* pour toutes les charges appréciables en argent qui y sont stipulées en sa faveur, sans qu'il soit nécessaire de fixer par l'acte même la valeur de ces charges.

2° Qu'une semblable donation donne la même hypothèque aux tiers en faveur desquels ces charges ont été stipulées.

Sir A. A. DORION, J. C.

Le 20 mars 1868, Mde. Dubord a donné à son fils Jos. Eléonore Dubord certains immeubles, à la charge de loger l'intimée, de la nourrir, éclairer, etc. Sur cet acte enregistré le 4 janvier 1865, l'intimée a porté une action hypothécaire contre l'appellant, détenteur de l'un des immeubles donnés, pour deux quartiers de cette pension qu'elle estime à \$150.

Défense, 1° l'intimée n'a pas d'hypothèque, 2° la dette n'est pas claire et liquide et ne peut être réclamée par action hypothécaire, 3° l'intimée s'est mise dans l'impossibilité de lui

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Dubord.

céder ses droits, 4^o la dette n'est ni claire, ni liquide, ni due au montant, à la forme et en la manière réclamée. Sur cette contestation les parties ont procédé à la preuve. Des experts ont été nommés et ont estimé à \$125 la valeur des charges réclamées. La Cour Supérieure a débouté l'action, et la Cour de Révision, le Juge en chef MEREDITH et le Juge CARON, ont renversé le jugement de la Cour Supérieure, et condamné l'appelant à payer \$62.52 pour 6 mois des charges en question, échus le 1er mai 1876, si mieux il n'aimait délaisser.

La question principale est de savoir si l'acte de donation du 20 mars 1865 a créé une hypothèque sur la propriété dont l'appelant est le détenteur. Depuis le 31 décembre 1841, nulle hypothèque générale ne peut être stipulée, et toute hypothèque spéciale doit désigner la propriété hypothéquée, et spécifier la somme pour laquelle l'hypothèque est donnée. 4 Vict. c. 30, s. 28, S. R. B. C. c. 37, s. 45. Cette disposition de l'ord. d'enregistrement a été modifiée par l'Acte 16 Vict. c. 206, s. 7, relativement aux rentes viagères et autres charges appréciables en argent stipulées dans les donations entrevifs. (S. R. B. C., ch. 37, s. 45, s. s. 3,—Code Civil, Art. 2042, 2044, *Chapais vs. LeBel et LeBel*, opposant, 3 Rap. Jud. B. C. 477.).

En vertu de ces dispositions un donateur qui fait enrégistrer son acte de donation conserve son hypothèque privilégiée de bailleur de fonds (Code Civil, Art. 2014—Pothier, *Traité de l'hypothèque*, ch. 1, s. 2, §. 3, ch. 2, s. 3), pour toutes les charges appréciables en argent qui y sont stipulées en sa faveur, sans qu'il soit nécessaire de fixer par l'acte même la valeur de ces charges.

Mais une semblable donation donne-t-elle la même hypothèque aux tiers en faveur desquels ces charges ont été stipulées? Cette question n'en est pas une, puisque l'art. 1129 du Code Civil permet à une partie de faire des stipulations au profit d'un tiers, lorsqu'elle en fait la condition d'une donation qu'elle fait à quelqu'un.

Madame Dubord avait une hypothèque pour toutes les charges stipulées dans la donation. Elle aurait pu elle-même porter une action hypothécaire pour forcer l'appelant à remplir envers l'intimée, sa fille, les charges qu'elle avait imposé à son

fil, son donataire. Or si elle pouvait elle-même poursuivre hypothécairement, pourquoi l'intimée, à qui elle a délégué son débiteur, ne pourrait-elle pas le faire, cette délégation acceptée ayant tous les effets d'une cession parfaite ? *Dupuis vs. Cedillot et Kelley*, 10 L. C. Jurist. 338,—*Pattenaude vs. Lériger de Laplante*, 1 L. C. J. 113,—*Dubord vs. Martel*, 18 novembre 1876, C. S. Trois-Rivières,—*D'Orvilliers vs. Martel*, 26 avril 1875, Cour de Révision, Québec.

Dufresne
et
Dubord.

L'appelant a cité dans son factum des extraits de Demolombe, T. 24, No. 256, de Troplong, Priv. et hyp. No. 216, et de Larombière sur l'art. 1121, §. 9. Mais quelque soit la valeur de ces autorités, elles n'ont jamais reçu d'application ici, du moins dans le sens que veut lui donner l'appelant. Dès 1843 il a été jugé dans une cause No. 584, *Demers contre Martin dit Ladouceur et Martin dit Ladouceur*, opposante, que les enfants du donateur avaient une hypothèque de bailleur de fonds pour les charges stipulées en leur faveur dans un acte de donation, même lorsque cet acte avait été révoqué depuis entre le donateur et le donataire.

Du reste la citation de Larombière ne milite nullement contre les prétentions de l'intimée. "S'agit-il d'une donation, (dit l'auteur à l'endroit cité) il, (le tiers) n'aura pas le droit de revocation pour inexécution des charges (cela est évident) ; mais il profitera des garanties particulières stipulées dans le contrat pour son entière exécution, telles que l'hypothèque consentie sans limitation par l'acquéreur ou le donataire."

Pour ces raisons le Jugement de la Cour de Révision doit être confirmé.

P. N. Martel, pour l'appelant.

J. H. V. Bureau, pour l'intimé.

SUPERIOR COURT, QUEBEC.

1875.

No. 525.

Coram MEREDITH, C. J.REGINA *ex relatione* O'FARRELL vs. BRASSARD *et al.*

Held:—That, in a case of prohibition where a conviction, by the Council of the Bar, of a member of the profession, is sought to be prohibited, with conclusions for costs only against the private prosecutor before the Bar, the Court will allow the Judge, the Council of the Bar, to plead, independently of the other Defendants to the *demande* for such prohibition.

Per curiam.—The council of the bar have moved for leave to plead; and it has been very strenuously contended on the part of the plaintiff, and numerous authorities have been cited as establishing that the council should not be allowed to plead.

I shall endeavor to explain my views as to the contention thus advanced, in as few words as possible.

The object of the writ of prohibition according to Corner (1) is "to forbid any Court to proceed in any case, therein depending, on the suggestion that the cognizance thereof doth not belong to the Court."

It is true that the writ is directed usually, not only to the Judge, but also to the plaintiff in the suit in the Inferior Court (2). But the Judge prohibited is the party to whom the writ is mainly addressed. Accordingly I find that, in eight of the cases in Wentworth, to which my attention has been drawn by the learned petitioner, the suggestions for prohibition concluded with these words: "Wherefore the said— prays relief and a writ of prohibition to be directed to the spiritual Judge, his surrogate, or other Judge competent in that behalf, to prohibit them, &c., &c." (3), no allusion being made to the prosecutor in the

(1) I Corner's Crown Practice, 246.

(2) Chitty's Gen. Practice, vol. 2, p. 356.

(3) Wentworth's Pleading, vol. 6, pages 244, 268, 275, 279, 286, 288, 293, 295.

Court below ; and, in the two forms of writs of prohibition given by Wentworth (1), the writ is addressed to the Inferior Court, and to no one else.

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Brassard.

The English Act, I William IV, ch. 21 (2), "to improve the "proceedings in prohibition," after declaring what shall be the contents of the declaration, in case the plaintiff is directed to declare in prohibition, provides: "to which declaration the "party defendant may demur, or plead such matters by way of "traverse or otherwise as may be proper to shew that the writ "ought not to issue."

Under our Code of Civil Procedure, the defendants, if they appear, must plead specially within four days (3); and it appears to me that the Judges prohibited, to whom, as already shewn, the writ may be exclusively directed, are parties defendant within the meaning of the English Statute and of our own Code, so as to give them the right to plead.

It is *quite true*, as contended by the learned plaintiff, that, in the cases to be found in Wentworth, and in many other cases cited, the party who pleaded, was the plaintiff in the Court below, and not the Judge prohibited; but it is easily understood that the prosecutor in a suit may take more interest in the jurisdiction of the Court than the Court itself; and the spiritual Judges, in the cases given by Wentworth, may have felt, as perhaps some temporal Judges would feel, that to have their jurisdiction abridged of certain classes of cases would be rather a gain than a loss.

We do, however, see that in the important case of *Cox v. The Lord Mayor of London et al.*, which went to the House of Lords, the defendants, who were the Judges, prohibited, pleaded; and their right to do so was not questioned in any of the Courts. In that case also Buckmaster & Co., who were the plaintiffs in the Court below, were not brought in by the declaration in prohibition (4).

(1) Wentworth's Pleading, vol. 4, pages 244, 269.

(2) Evans' Statutes, vol. 9, p. 20.

(3) Code of Civil Procedure, art. 1031, 1024, 1002.

(4) I Hurlstone and Coltman, p. 339.

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It is true that, in that case, the Judges prohibited were the only defendants; but, if it appears by the declarations and writs already referred to in *Wentworth*, and by the leading case of *Cox v. The Lord Mayor of London et al.*, the plaintiff in the Court below need not necessarily be made a party to the proceeding by prohibition, then it can hardly be contended that the plaintiff in prohibition, by bringing in a party that he need not bring in, can thereby deprive a party whom he must bring in, of the right to plead.

It was also contended that the defendants, in the case of *Cox v. The Lord Mayor of London et al.*, had a pecuniary interest in the jurisdiction, which they attempted to maintain. I cannot, however, see that such was the case; but, be that as it may, the jurisdiction now in question was given to the Council of the Bar, "for the maintenance of the discipline and honor of the body." It is not only their interest, but their duty, to prevent any undue limitation of the jurisdiction given to them for that purpose; and they have now the same reason for maintaining their jurisdiction that the Legislature had for conferring it upon them.

Indeed from the very first it appeared to me that it would be more than strange to call upon a body, such as the Council of the Bar, to hear their conduct declared illegal, without affording them an opportunity of justifying themselves, and maintaining their jurisdiction (1); and I would have hardly felt myself justifiable in thus explaining my views on the subject, were it not for the care and ability with which the case was argued.

O'Farrell, for Plaintiff in Prohibition.

Irvine, Q. C., for Council of the Bar.

(1) Vide 15 Jurist p. 19, where the Privy Council speak even of the Judges of the Queen's Bench, as not having appeared to argue the case.

COUR DU BANC DE LA REINE.—EN APPEL.

QUÉBEC, 8 JUIN 1878.

No. 6.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

MATTE et LAROCHE.

LÉGATAIRE PARTICULIER—RÉTENTION POUR IMPENSES—
PRIVILÈGE—ENREGISTREMENT.

Jugé :—1. Que le droit de rétention pour impenses de la part d'un légataire particulier poursuivi en réduction et remise du legs par un créancier de la succession, n'existe pas en vertu de l'article 419 du Code Civil, mais qu'il n'y a lieu qu'à un privilège sur le prix de l'immeuble vendu suivant l'article 2072 du Code Civil.

2. Que le droit de séparation de patrimoine dans le cas d'un seul immeuble légué se trouve compris dans la demande en remise de ce seul immeuble.

3. Que l'enregistrement du droit du créancier n'implique qu'un droit de priorité vis-à-vis d'autres créanciers.

• Le Juge en chef Sir A. DORION, explique les motifs du jugement :

Le Juge TESSIER, ajoute :

Edmond Laroche a fait son Testament le 9 mars 1873, et il est mort aussitôt après, le même jour.

Par son Testament il a institué sa femme légataire universelle en usufruit et ses enfants légataires universels en propriété. Il a fait un seul legs particulier par lequel il a légué à son frère Isaie Laroche, le défendeur actuel, une terre située à St. Agathe, admise être de la valeur de \$500. Ces légataires universels et ce légataire particulier se sont trouvés saisis de leur legs au décès du testateur suivant l'article 891 de notre Code Civil.

Le demandeur Matte, créancier du testateur Edmond Laroche, a obtenu jugement contre sa veuve en son nom et comme tutrice à ses enfants, le 11 décembre 1874, pour une somme de \$135 intérêt et dépens.

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Les biens de la succession du dit feu Edmond Laroche furent saisis et vendus, et comme il ne restait rien pour payer le créancier Matte, celui-ci porta une action contre le légataire particulier Isaïe Laroche le 14 octobre 1876 pour le forcer à délaisser l'immeuble à lui lègué pour que les créanciers non payés de la succession de feu Edmond Laroche et notamment le demandeur fussent payés de leur dû.

A cette action le défendeur Isaïe Laroche plaida par une défense en fait et par une exception temporaire. Il alléguait qu'il avait fait sur l'immeuble certaines impenses utiles au montant de \$150, et conclut à ce que le demandeur fut condamné à lui rembourser *préalablement* cette somme, sinon que son action fut déboutée avec dépens.

La Cour Inférieure a, par son jugement du 9 juillet 1877, maintenu ce droit aux impenses, et ordonné au demandeur de les payer *préalablement* au désir de l'article 419 du Code Civil, sous un délai fixé.

Le demandeur n'ayant pas payé dans le délai fixé, le 19 octobre 1877 il est intervenu un autre jugement déboutant l'action du demandeur avec dépens.

C'est de ces deux jugements qu'il y a appel.

La première question qui s'élève est de savoir s'il y a dans le cas actuel droit de rétention suivant l'article 419 du Code Civil, ou si le droit aux impenses n'est pas plutôt, dans ce cas-ci, réglé par l'article 2072 de notre Code Civil, qui conserve seulement au tiers détenteur le privilège d'être payé de ses impenses sur le produit de l'immeuble après le délaissement qui en est fait.

Il est bon de remarquer ici que les parties ont admis " que la valeur de l'immeuble est d'environ \$500, et que la valeur des impenses est de \$150.

L'article 419 sur lequel la Cour Inférieure s'est appuyée, s'applique entre le propriétaire qui veut reprendre l'immeuble et le possesseur. En effet l'article 419, dit : " Dans le cas où le tiers détenteur est tenu de *restituer* l'immeuble sur lequel il a fait des améliorations ; il lui est permis de le retenir jusqu'à ce que le remboursement soit effectué,"... " sauf le cas de *délaisse-*

“ *ment* sur poursuite hypothécaire, auquel il est pourvu au titre
“ des *Privilèges* et hypothèques.”

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En ce cas, s'il était permis au propriétaire de reprendre l'immeuble sans rembourser préalablement les impenses au possesseur, celui-ci ne resterait qu'avec un recours souvent illusoire. Mais dans ce cas-ci il ne s'agit que de faire délaisser et vendre l'immeuble en justice, pour que la dette du créancier et le droit du possesseur aux améliorations soient satisfaits suivant leur rang et privilège. Il faut donc par analogie appliquer l'article 2072 du Code Civil dans le cas de l'action hypothécaire dont les conclusions sont semblables à la présente action.

Pothier, dans son *Traité de l'hypothèque*, chap. 2, art. 2, section 4, en parlant de l'exception des impenses, explique la différence du droit Romain qui établit la rétention avec le droit français qui ne l'établit pas, comme suit : “ le droit de retenir
“ l'héritage ne doit point être suivi dans notre droit et on doit
“ seulement lui accorder le droit d'être payé à l'ordre des im-
“ penses nécessaires par *privilège* sur tout le prix, etc., et des
“ utiles sur la plus value, etc.”

A ce point de vue donc, le jugement de la Cour Inférieure me paraît erroné.

La deuxième question est de savoir si le créancier demandeur était tenu de faire et a fait en temps utile une demande en séparation de patrimoine, et s'il y a là un défaut qui doit faire débouter l'action du demandeur.

Il est bon d'observer que cette objection n'a pas été soulevée par aucune exception du défendeur ; peut-elle être prise au moyen de la défense en fait produite ?

Cette séparation de patrimoine est définie ainsi par Trop-
long qui emprunte cette définition à Duranton. “ C'est une
“ demande par voie d'*exception* opposée aux créanciers personnels
“ de l'héritier qui voudraient venir en concours avec lui sur
“ les biens de la succession.”

Pothier, des successions (édition de 1819.), vol. 10, p. 340,
2, 3. Toullier, vol. 2, p. 335, 6, 7 éd. belge.

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En effet n'est-ce pas une espèce d'exception que l'on peut par analogie comparer à l'exception de confusion ? Ce moyen comme celui de la novation, de la prescription, ne doivent-ils pas être invoqués spécialement, parceque le débiteur ou détenteur peut y renoncer tacitement, s'il ne l'invoque pas ?

Mais, en supposant que cette objection serait valablement prise par la défense en fait, quelle est la formule de la demande en séparation de patrimoine ? A qui doit-elle être signifiée ? Sur ce point on trouvera que nos codes, aussi bien que les codes Napoléon sont silencieux, et nous laissent dans une voie assez obscure. Voici ce que M. Barafort, dans sa préface du Traité de la Séparation de Patrimoine, dit sur ce point :

“ Cette matière est difficile entre toutes.”

Lebrun disait autrefois ; “ cette matière a ses difficultés.”

“ De nos jours M. Cabantous a pensé qu'elle était une des “ matières les plus fécondes en difficultés et les moins explorées “ de notre droit.”

M. Blondeau ajoute : “ Il n'est pas de partie de notre droit “ privé sur laquelle les auteurs du Code Civil aient plus “ vaguement exprimé leur pensée, sur laquelle ils aient eu des “ idées moins arrêtées.”

Demolombe, des successions, vol. 5, œuvres vol. 17, page 156, dit : “ Nous avons déjà cité Lebrun qui nous apprend que “ de son temps la séparation est de *plein droit* et non sujette à “ *demande*, et Basnage n'est pas sur ce point moins explicite :

Demolombe, page 157. “ Le droit de séparation des patri- “ moines est un droit de préférence, un privilège... or les pri- “ vilèges s'exercent dans les ordres ou dans les distributions par “ contribution...”

“ Eh ! pourquoi donc une demande ? pourquoi un juge- “ ment ? à quoi bon ces frais ?

S'il n'y a pas de formule spéciale, ne peut-on pas dire que la présente demande contient en substance une demande en séparation de patrimoine ? Le seul patrimoine qu'il s'agit de *séparer*, ou si l'on veut, de ne pas *confondre* avec les autres biens de

l'héritier ou du légataire particulier, c'est un seul immeuble, une terre en la paroisse de Ste. Agathe.

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Les conclusions sont à l'effet que cette terre soit délaissée en justice, pour que les créanciers qui y ont des droits soient payés suivant leur rang. Ceci me paraît suffisant, et emporte de soi *séparation*. (1)

Mais l'objection la plus forte est peut-être celle-ci. Cette demande a-t-elle été faite en temps utile, a-t-elle été enregistrée dans les 6 mois après la mort du testateur, suivant les articles 743, 886 et 2106 du Code Civil ? L'article 743 dit : "Ce droit peut être exercé tant que les biens existent dans les mains de ces derniers (légataires), ou sur le prix de l'aliénation, s'il est encore dû."

L'article 886 dit : "le créancier doit s'être prévalu à temps du droit de séparation des patrimoines."

L'article 2106 dit : "Les créanciers et légataires qui demandent la séparation de patrimoine conservent la *préférence* sur les biens de leur débiteur décédé, à l'encontre des créanciers des héritiers ou représentants de ce dernier, pourvu qu'ils enregistrent dans les 6 mois les droits qu'ils ont contre sa succession."

Que l'on remarque bien. L'article dit : conserve la *préférence*. Ici il ne s'agit pas de *préférence à l'encontre des créanciers des héritiers*, il est simplement demandé que l'immeuble soit délaissé pour que chacun soit payé sur le produit suivant son droit et son rang.

Par exemple : un créancier du légataire particulier, le défendeur en cette cause, a pu enregistrer une créance contre l'immeuble en question, et si le demandeur actuel, créancier de la succession, n'a pas enregistré son droit dans les 6 mois, la question pourra s'élever s'il a conservé son *droit de préférence* à l'en-

(1) Demolombe, vol. 17, p. 224, No. 199:

"La confusion... qui, à l'égard des meubles peut être si souvent un obstacle à la séparation de patrimoine, ne saurait guère se concevoir à l'égard des immeubles..... nous ne croirions même pas qu'en général, les travaux..... que l'héritier aurait pu faire..... constructions, plantations, etc., pussent fournir un moyen contre la demande en séparation formée par les créanciers du défunt: ce qui en résulterait c'est qu'il pourrait y avoir lieu à la distraction sur le montant du prix de la vente....."

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contre de ce créancier de l'héritier (légataire) qui a enregistré. Voilà l'application de l'article 2106 ; mais il est de droit rigoureux, il ne faut pas l'étendre plus loin.

Pothier, Traité des successions, chap. 5, art. 4, (édition de 1819, vol. 10, p. 342). " Par le droit romain, cette séparation " doit être demandée *rebus integris*, avant que les biens du défunt " soient mêlés avec ceux de l'héritier, et tout au plus tard dans " les cinq ans. Par notre droit il n'y a aucun temps limité ; on " est toujours à temps, tant que les biens de la succession peu- " vent encore facilement se démêler avec ceux de l'héritier."

Lebrun, des Successions, liv. 4, ch. 2, s. 1, No. 24, *in fine*. Si donc les choses sont *integræ* séparées de leur nature, pourquoi refuser les recours du créancier ?

Notre Code, en donnant la saisine immédiate des biens aux légataires particuliers (art. 891 C. C.) permet à ces légataires de les aliéner de suite, et que devient le recours du créancier de la succession ? Un testateur pourrait-il donner ses biens par legs particulier au préjudice de ses créanciers ?

Notre Code aux articles 735 dit : " Le légataire particulier " est tenu (au paiement des dettes) au cas d'insuffisance des " autres biens."

Art. 880, " Les dettes du testateur sont *dans tous les cas pré-* " *férées* au paiement des legs."

Le défendeur actuel, s'il veut prendre avantage de quelque défaut d'enregistrement, s'est-il bien conformé lui-même aux réquisitions de l'article 2098, qui exige l'enregistrement du droit de transmission avec déclaration de la date du décès du testateur ? l'a-t-il allégué et prouvé ?

L'article 880 de notre Code dit : " Le droit au legs n'est pas accompagné d'hypothèque."

Le légataire (l'intimé) a-t-il allégué et prouvé son inscription spéciale pour réclamer priorité ou préférence ?

Il est mieux de décider la cause sur les véritables points que les parties ont mis en contestation, et sur les faits qu'ils ont posés dans leur admission de faits, et d'après cela il me paraît

conforme à la loi et à la justice d'accorder les conclusions de la demande du créancier, et de renverser le jugement qui a débouté son action.

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Ci-suit le Jugement de la Cour :

La Cour, etc., considérant que par cette action, l'appelant créancier de feu Edmond Laroche pour une somme de \$185.94 ayant établi qu'il a discuté les autres biens de la succession sans avoir pu être payé, demande à ce que l'intimé, légataire particulier de l'immeuble désigné en la déclaration, soit tenu de le rapporter et de le délaisser en justice, si mieux il n'aime payer la créance de l'appelant.

Et considérant que l'appelant ne réclame pas un droit de propriété, mais que son action est une demande en délaissement pour être payé en vertu d'un droit de préférence qui lui est reconnu par les articles 735, 743 et 886 du Code Civil sur un immeuble qui lors du décès de son débiteur ferait partie des biens de sa succession.

Et considérant que l'intimé a établi qu'il avait fait des dépenses au montant \$150 pour lesquelles il a une créance privilégiée sur l'immeuble dont on lui demande le délaissement et qui est de la valeur d'environ \$500.

Et considérant que sous ces circonstances l'intimé n'a pas le droit de retenir l'immeuble jusqu'à ce qu'il ait été payé de ses dépenses conformément à l'article 419 du Code Civil, qui n'est pas applicable aux circonstances de cette cause, mais seulement celui d'exercer conformément à l'article 2072 sa créance privilégiée sur le prix de l'immeuble en question qui devra être vendu sur un curateur au délaissement dans le cas où l'intimé ne se prévaudrait pas de l'option qui lui est offerte de payer la créance de l'appelant.

Et considérant qu'il y a erreur dans le jugement que la Cour Supérieure a rendu à Québec, le 9 juillet 1877 et par lequel elle a donné à l'appelant délai jusqu'au 15 Septembre 1877 pour payer à l'intimé la somme \$150 pour impenses, et qu'il y a aussi erreur dans le jugement rendu par la dite Cour Supérieure, le 19 Octobre 1877, qui a renvoyé l'action de l'appelant pour n'avoir pas payé à l'intimé cette somme de \$150 dans le délai fixé par le

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jugement du 9 Juillet, 1877. Et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, adjuge et déclare que l'immeuble désigné comme suit, en la déclaration en cette cause, savoir : un lot de terre ou emplacement situé dans la paroisse de Ste. Agathe dans le comté de Lotbinière connu sous le numéro 5 dans la concession, est affecté spécialement au paiement d'une créance se montant à la somme de \$185.94 avec intérêt sur la somme de \$135.64 à compter du 19 Octobre, 1876, et que le dit intimé soit en conséquence tenu, sous 15 jours de la signification de ce jugement de rapporter cet immeuble et de le délaisser en justice pour qu'il soit vendu sur le curateur qui sera créé au délaissement, pour être l'appelant payé de sa créance selon ses droits de préférence et priorité, si mieux n'aime l'intimé payer à l'appelant sa créance en capital, intérêts et dépens, cette Cour réservant à l'intimé son droit d'être payé selon son privilège sur le prix de la dite vente pour le prix de la dite somme de \$150, valeur admise des impenses utiles qu'il a faites sur cet immeuble. Et cette Cour condamne de plus et dans tous les cas l'intimé à payer à l'appelant les dépens, tant ceux encourus en Cour Inférieure que sur le présent appel.

Suzor & Tessier, pour l'Appelant.

Bossé & Languedoc, pour l'Intimé.

NOTE A. Les articles de notre Code sur cette matière sont un peu différents du Code Napoléon. Ainsi notre article 735 dit : "*le légataire particulier n'est tenu 1° qu'au cas d'insuffisance des autres biens, et 2° aussi hypothécairement :*

L'article 871 du Code Napoléon dit : "*légataire particulier n'est pas tenu des dettes, excepté hypothécairement.*"

Notre article 890 dit : "*Les dettes du testateur sont dans tous les cas préférées au paiement des legs.*"

L'article 1017 correspondant du Code Napoléon ne contient rien d'aussi explicite ; c'est la règle de l'ancien droit tirée des autorités citées au bas de notre article 880. Pothier et Bourjon.

Notre article 887, dit : "*Le créancier de la succession a, dans la cas de réduction du legs particulier, un droit de préférence sur la chose léguée à l'encontre des créanciers du légataire comme dans la séparation de patrimoine.*"

"*Le légataire particulier a son recours contre les héritiers etc.*"

On ne trouve rien comme la 1ère partie de cet article dans le Code Napoléon ; c'est de l'ancien droit.

Notre article 2106 prescrivant l'enregistrement dans les 6 mois, tiré de l'article 2111 du Code Napoléon est aussi différent. Notre article dit : "*conservent la préférence*"

sur les biens de leur débiteur..... L'article 2111 du Code Napoléon dit : " conservent leur privilège." Il ajoute : " aucune hypothèque ne peut être établie sur ces biens avant l'expiration du délai, (des 6 mois)." Cette règle là n'existe pas dans notre Code. Matte
et
Laroche.

NOTE B. Domolombe, vol. 17, No. 197, p. 232. " C'est une question controversée, si le droit de demander la séparation de patrimoine quant aux immeubles est soumise à une prescription quelconque."

Plusieurs invoquent la prescription de 30 ans. 4

" Nous pensons que ce droit, relativement aux immeubles, n'est soumis à aucune prescription spéciale."

Barafort, Traité de la Séparation des Patrimoines, page 381.

Arrêt du 26 avril 1864. Dalloz, anno 1864.

SUPERIOR COURT,—QUEBEC.

11TH MAY, 1878.

Coram STUART, J.

PARENT vs. PICARD,

Held:—That the failure to state in the writ the Plaintiff's names in full, and the giving a wrong name to Defendant, are not mere irregularities subject to amendment. but nullities, and cannot be amended.

Per curiam.—On the 8th February last, there issued a writ of summons in this cause, which was served on the 13th and returned on the 25th February last.

On the twenty-sixth of February the defendant fyled an appearance and on March the first, an exception to the form alleging *inter alia*, " that the Plaintiff has not sued under his name ; that the defendant's name is not Picard but Collet."

On the 1st of April last, the plaintiff moved to amend the writ, by adding " Simon " to the plaintiff's name, and to the defendant's name " Jean Baptiste Collet dit Picard."

The fact of moving to amend the names of the plaintiff and defendant, both to meet the *exception à la forme*, looks as if the plaintiff admitted the error in the writ in this particular, but I am not called upon to express any opinion upon the validity of

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the "*exception à la forme*." The question to be decided is, can the names of the plaintiff and defendant be amended so as to render valid the summons of the defendant and impose on him the obligation to put in a defence to the action.

C. P. C. art. 49. "The writ must state the names, the occupation or quality and domicile of the plaintiff and the names and actual residence of the defendant." Art. 51. "The formalities mentioned in art. 46, 47, 49 and 50 are required on pain of nullity."

C. P. C. art. 116. "The following ground must be pleaded by exception to the form: 1st Informalities in the writ or service; 2nd Informalities in the declaration, when it controvenes the provisions contained in art. 14, 19, 50, 52 and 56."

Art. 117. "The plaintiff, upon an exception to the form, as well as at any other time before judgment, may, by leave of the court, amend either the writ or the declaration, on payment of such costs as the court determines."

The *exception à la forme* in the particulars mentioned does not invoke either a nullity in the service or an informality in the demand, both of which would have been covered by an appearance, without taking advantage of these objections; but it rests on an alleged nullity in the writ, and it invokes the nullity and prays the writ may be set aside.

An irregularity is a formal, but a nullity is always a substantial defect. As the law requires that every writ shall contain the names as well of the plaintiff as those of the defendant, under pain of nullity, is a writ which does not contain the names of the one or the other, a writ which the Court can legalise and hold to be effective to bring a party before the Court to defend himself against a claim of any kind made upon him by the plaintiff? The law has declared such a writ null; can it be operative, nevertheless, to bring the defendant before the Court for any other purpose than that of having it so declared by the Court? This would be confounding irregularities with nullities. The one may always be amended, the other cannot.

It has been decided that if a proceeding be expressly di-

rected to be taken, its omission amounts to a nullity. *Mortimer v. Pigott*, 2 Dowl. 616. *Garratt v. Hooper*, 1 Dowl. 28. Parent v. Picard.

A void proceeding is so entirely vitiated as to be incapable of amendment, but if merely irregular, the Court, under certain circumstances, will allow it to be amended. *Kenworthy v. Peppiot*, 4 B. and Ald. 288.

If the writ be absolutely void, no person whatever can justify under it. *Parsons v. Lloyd*, 2 W. Bl. 845. *Grant v. Bagge*, 3 East, 128. *Carratt v. Morley*, 1 A. and E. 18, N. S. *Mitchell v. Foster*, 12 A. and E. 472. *Bates v. Pilling*, 6 B. and C. 38.

The sheriff should not execute mesne process when the defendant is incorrectly named, for if defendant were commonly known by that name; so as to afford a justification to the sheriff, yet he is not liable for not arresting. *Morgans v. Brydges*, 1 B. and Ald. 647.

And if defendant were not so known and be arrested, the sheriff is liable at his suit. *Cole v. Hindson*, 6 T. R. 234.

The copy of the writ after service, being beyond the power of the Court, never can be amended; an amendment of the writ itself will generally be allowed in one case alone, viz: where by compelling plaintiff to commence *de novo*, the statute of limitations would be a bar. *Byfield v. Street*, 2 Dowl. 739. *Hodgkisson v. Street*, 1 A. and E. 535, 9 Dowl. 529, 6 ib. 627.

Were it not that the law makes it a nullity, not to give the names of the plaintiff and defendant a wrong name, would be a mere irregularity subject to amendment, but a void proceeding cannot be amended.

Motion rejected.

Amyot & Casgrain, for Plaintiff.

Suzor & Tessier, for Defendant.

SUPERIOR COURT, QUEBEC.

8TH FEBRUARY, 1878.

Coram MEREDITH, C. J.WYATT vs. SENECAI *et al.*

RAILWAY BONDS—SAISIE CONSERVATOIRE.

The holder of railway bonds, constituting a privileged claim on the moveable property of the company, may, for the protection of his rights, proceed against such property by an attachment in revendication in the nature of a *saisie conservatoire*.

Per curiam.—This case comes before the Court upon a motion to quash the *saisie revendication* therein issued.

The declaration alleges that the plaintiff is the holder of certain bonds, duly issued by the Levis and Kennebec Railway Co., in virtue of various acts of the Legislature of this Province, that by law, and by the tenor of the said bonds, the railway belonging to the said company, and all the rolling stock and equipment thereof, became, were and are mortgaged and hypothecated in favour of the said plaintiff, for the amount of the said bonds, and of the interest due, and to become due thereon.

The declaration further alleges that, for some time previous to the institution of this action, the defendants were in possession of the said railroad, and of all the rolling stock belonging to the same. And that the defendants with intent to defraud the plaintiff, and to deprive him of his just rights as a mortgagee of the said road, had caused part of the rolling stock, to wit, nine platform cars, to be moved from the said railway, and to be placed on the Grand Trunk Railway, at the St. Henri Station, with the intention of causing them to be sent to the Acton Station, on the Grand Trunk R. R., at a distance of more than 100 miles from the Levis and Kennebec R. R.

Upon an affidavit, alleging these facts, the plaintiff obtained a writ of *saisie revendication*, under which the said platform cars have been seized. And the defendants now move that the writ, so obtained, may be quashed, on the ground that, even according to the allegations of the plaintiff's declaration, the plaintiff was

not entitled to a writ of *saisie revendication*; and more particularly that the present case is not one of those in which a writ of *saisie revendication* is allowed by art. 866 of the Code of Procedure.

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The plaintiff, it must be admitted, is not an "owner, deposi-
tary, usufructuary, institute or substitute" within the meaning
of that article. It is true, however, that under the Quebec Rail-
way Act of 1869, railways have the power of pledging their
property; but the plaintiff never had possession of the platform
cars now seized, and therefore cannot, either under the com-
mon law, or under the Code, have the rights of a pledgee.

On the other hand there can be no doubt that the plaintiff
has a hypothec for his bonds; and I believe it is not denied
that that hypothec extends to the rolling stock. Moreover under
the 4th section of the 86 Vict. Cap. 45, the bonds "constitute
"a privileged claim on the moveable property of the said com-
pany."

Such being the case the plaintiff contends he must have
some means of protecting the privilege and hypothec which he
holds under the law.

The defendants answer that the plaintiff can protect his
hypothecary right now sought to be enforced, by a writ of ca-
pias, under art. 800. But the plaintiff replies, that the effect of
a writ of capias would be, simply, to keep the defendants within
the Province, and that that would be of no advantage to him,
and that, at any rate, any remedy he may have against the de-
fendants persons ought not to interfere with his remedy for
the protection of the property in which the law gives him an
interest.

This is the first case, so far as I know, in which the question
now to be decided has been discussed; and it is certainly by
no means free from difficulty. It does however appear to me
that the right which in the present case the plaintiff has as an
hypothecary creditor, is in effect very nearly the same as the
privilege which an unpaid vendor, who had sold *on credit*, was
allowed under the 177th article of our custom.

The unpaid vendor who had sold for *ready money*, had a
right to proceed under article 176 as owner. His position, there-

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fore, would be quite different from that of the present plaintiff, who is not and does not claim to be the owner.

But the unpaid vendor, under a credit sale, had merely a privilege on the proceeds of the sale of his goods, in the same way as the plaintiff would have a privilege upon the proceeds of the hypothecated property if it were brought to sale. The unpaid vendor, *under a credit sale*, was not an owner, pledgee, depositary, usufructuary, institute or substitute, within the meaning of article 866 of our Code of Procedure, and yet he was constantly allowed to protect his privilege by a *saisie conservatoire*, which in this district was called a *saisie revendication*, and which differed but little, if at all, in legal effect, from the process now before the Court.

In three cases reported 2 L. C. J. p. 101, it appears to have been decided by Mr. Justice MONDELET and Mr. Justice SMITH that an unpaid vendor, who had sold on credit, might seize the goods sold, in the hands of the vendee who had become insolvent.

A decision to the same effect was rendered by Mr. Justice BADGLEY in *Leduc v. Tourigny*, (1) and by Mr. Justice MONK in *Baldwin v. Denmore*, (2) the process being spoken of in the two cases last mentioned as a *saisie conservatoire*.

In the following year, in this district, in the case of *Poston v. Gagnon*, (3) the plaintiff, an unpaid vendor, who had sold on credit, sued out a *saisie revendication*; and the only question which seems to have been discussed was as to whether the plaintiff had a right to a *saisie revendication* without an affidavit.

Sir A. DORION in rendering the judgment of the Court of Appeal in *Henderson v. Tremblay*, (4) referred approvingly to the judgments in *Torrance v. Thomas*, *Leduc v. Tourigny* and *Baldwin v. Benmore*, above cited, observing: "Les tribunaux du pays ont souvent permis aux parties intéressées de pratiquer des saisies

(1) *Leduc v. Tourigny*, 5 Jur. p. 123.

(2) *Baldwin v. Benmore*, 6 Jur. p. 297.

(3) *Poston v. Gagnon*, 12 L. C. Rep. p. 252.

(4) *Henderson v. Tremblay*, 21 Jur. p. 24.

“ conservatoires pour protéger, dans des cas analogues, des droits
 “ qu’elles étaient exposées à perdre.”

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The judgment of the Court of Appeals in *Henderson v. Tremblay*, itself, has an important bearing on this case.

The plaintiff in that case as an unpaid vendor had sued out a *saisie revendication* ; the Court of Appeals declared that the sale was on credit, and, therefore, that the plaintiff was not in a position to exercise the right of revendication, but they, at the same time said, that although the attachment by the plaintiff was “ in the nature of a *saisie revendication*, it would nevertheless “ avail to him as a *saisie conservatoire*.”

The contention of the plaintiff is that if, as the defendants maintain, he be not entitled to a *saisie revendication*, under article 860, then that he must have a remedy under article 21, which declares that “ Whenever this Code does not contain any provision for enforcing or maintaining some particular right or just “ claim, or any rule applicable thereto, any proceeding adopted “ which is not inconsistent with law, or the provisions of this “ code is received and held to be valid.”

The plaintiff further contends that the remedy which he has adopted protects his rights, without interfering with the rights of any other person, and such seems to me to be the case, for the effect of the writ, so far as we now can see, is merely to prevent the carrying away of property hypothecated in favor of the plaintiff, and as to the name given to the writ, I do not think it ought to materially affect the question to be decided.

It is to be recollected that when the judgments of the Superior Court of which I have spoken were rendered, the defendants could urge, and did urge, the provision of the 27th Geo. III, declaring that attachments before judgment should be allowed in certain cases only ; and that the case of the unpaid vendor, who had given credit, was not one of those cases. Also that we had not at the time of the rendering of those judgments any general provision such as is to be found in article 21 of the Code of Procedure already cited. And if our Courts without any provision of law, such as that last mentioned, and notwithstanding the 27th Geo. III, allowed the unpaid vendor the benefit of a *saisie conservatoire*, for the protection of his privilege, it

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seems to me that the Courts, now, ought to allow the plaintiff as a privileged and hypothecary creditor a like remedy for the protection of his rights. For these reasons, although the case (which so far as I know now presents itself for the first time) is not free from difficulty, I deem it my duty to reject the motion of the defendants to quash the *saisie revendication*.

Motion rejected.

Holt, Irvine & Pemberton, for Plaintiff.

Bossé & Languedoc, for Defendants.

SUPERIOR COURT—QUEBEC.

10th FEBRUARY 1877.

No. 2030.

LORANGER vs. DEGASPÉ.

PETITION EN RADIATION D'HYPOTHÈQUE.

HELD, by MEREDITH, C. J., with the concurrence of the other Judges, That in petitions such as the present the hypothecs to be struck out must be specially described, and that each of the discharges or other papers relied on must be described in the same way, and a regular list of exhibits filed.

COUR DE CIRCUIT.

MONTREAL, 22 MAI 1878.

No. 11,241.

Coram DORION, J.

LEPAGE vs. WATZO.

Jugé :—1°. Qu'en vertu de " l'Acte des Sauvages, 1876 " (39 Vic. ch. 18.) les biens meubles et effets mobiliers des sauvages, sont exempts de saisie.

2°. Que le mot propriété, employé seul, dans une disposition de la loi, comprend les meubles et les immeubles indistinctement.

Le demandeur ayant obtenu jugement contre le défendeur, pour la somme de \$92, fit émaner contre lui, un bref de *Fieri Facias de bonis*, en vertu duquel ses biens meubles et effets furent saisis, et à l'encontre de cette saisie, le défendeur produisit l'opposition suivante :

Samuel Watzo, chasseur et commerçant, de la tribu des Abénakis de St. François de Sales, dans le district de Richelieu, faisant, aux fins des présentes, élection de domicile, au bureau de son procureur soussigné, rue St. Vincent, en la cité de Montréal, par sa présente opposition et moyens d'opposition afin d'annuler, à la saisie pratiquée contre lui en cette cause, dit et allègue :

Qu'il est sauvage, aux termes et conditions des lois et statuts concernant les sauvages, et comme tel, qu'il fait partie de la tribu des Abénakis de St. François de Sales ; laquelle est régie par les lois générales et les statuts de la Puissance du Canada concernant les sauvages.

Que tous les biens saisis en cette cause étaient, lors de la dite saisie et sont encore actuellement, dans les limites des terres spécialement réservées à la dite tribu, et en la possession du dit opposant, sauvage, comme susdit.

Que tant par les termes généraux que par les dispositions spéciales de l'Acte des Sauvages de 1876, les meubles et effets saisis en cette cause, sont exempts de saisie, et que le demandeur ne peut, en aucune façon, les rechercher en justice, comme il le

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fait par sa dite saisie ; laquelle est illégale, nulle et comme non avenue.

Pourquoi le dit opposant conclut à ce que la dite saisie soit déclarée illégale et nulle à toutes fins que de droit : et à ce que main levée lui en soit accordée avec dépens.

A l'encontre de cette opposition le demandeur produisit la contestation suivante :

Et le dit contestant pour moyens à l'appui de sa présente contestation, dit :

Que le fait que l'opposant est un sauvage, n'est pas suffisant dans l'esprit de la loi, pour empêcher la saisie et la vente de ses meubles.

Qu'en vertu de la loi, les immeubles seuls, sont réservés.

Que d'ailleurs, l'opposant est un commerçant, faisant des transactions journalières avec les blancs ; et que s'il y avait par la loi, une exception quant à la saisie des meubles des indiens, cette exception ne saurait s'appliquer à l'opposant.

Et il concluait au renvoi de l'opposition.

A cette contestation, l'opposant répondit en droit, comme suit :

Que toutes et chacune des allégations de la dite contestation, sont mal fondées en droit et insuffisantes pour lui en faire obtenir les conclusions, pour entre autres raisons, les suivantes :

Parce que le dit contestant ne démontre pas et ne fait pas voir par sa dite contestation, que les biens meubles et effets mobiliers de l'opposant, qui est un sauvage et comme tel, protégé par la loi, soient saisissables.

Parce qu'il ne démontre pas et ne fait pas voir par sa dite contestation, en quoi, comment et pourquoi, le titre de commerçant de l'opposant et ses transactions journalières avec les blancs, peuvent en loi, rendre ses meubles et effets saisissables.

Parce qu'en vertu des sections 66 et 69 de l'Acte des Sauvages de 1876 (39 Vic. ch. 18), tous et chacun des meubles et

effets du dit opposant, saisis en cette cause, étaient et sont exempts de saisie ; et que partant la saisie d'iceux effectuée comme susdit, est entièrement illégale, nulle et comme non avenue. Et l'opposant concluait, pour ces raisons, au renvoi de la dite contestation.

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Duhamel, lors de l'audition, prétendit, de la part du contestant, que cette opposition était pour le moins futile et devait être déboutée sur le champ.

Il soutenait que l'opposant n'avait fait aucune preuve de la nationalité par lui invoquée ; il le pensait cependant *sauvage sans traités* ; mais comme il faisait journellement des transactions avec les blancs, il n'avait aucun titre à la protection de l'Acte des Sauvages de 1876 ; il prétendit en outre, comme il avait déjà prétendu par sa contestation, que les immeubles seulement et non les biens mobiliers des sauvages, leur étaient réservés par la loi, il termina son argumentation, en offrant de prouver que l'opposant était commerçant ; mais la Cour le dispensa de ce soin et prit la cause en *délibéré*.

D'Amour, de la part de l'opposant, produisit, de consentement, entre les mains du Juge, le *factum* suivant :

Par son opposition, l'opposant se déclare sauvage abénakis du village St. François de Sales, district de Richelieu, et réclame, comme tel, la protection de l'Acte des Sauvages de 1876, et par sa *réponse en droit*, il invoque spécialement les sections 66 et 69 de cet acte.

Le contestant ne lui nie pas sa nationalité de sauvage ; au contraire, il l'admet formellement, par sa contestation, mais prétend que d'après l'esprit de la loi, il n'y a que ses immeubles d'exempts de saisie ; il admet donc implicitement, que s'il s'agissait d'immeubles, l'opposition serait bien fondée ; mais soutient, en même temps, que les meubles de l'opposant ne tombent pas sous l'effet de la loi.

En second lieu, le contestant prétend que parce que l'opposant est commerçant, il n'a pas droit à la protection de la loi.

Cette dernière proposition tombe d'elle-même, la loi ne faisant pas une telle exception.

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L'opposant n'avait pas à prouver sa nationalité, ce point étant admis en toute lettre au dossier.

La seule question sur laquelle cette Honorable Cour est appelée à prononcer, est celle de savoir si les meubles comme les immeubles de l'opposant, sont exempts de saisie.

La sec 69 de l'acte sus-cité dit : " Les présents faits aux sauvages ou sauvages sans traités, ni aucune *propriété*, etc, ne pourront être pris, saisis ou vendu pour aucune dette, etc."

Toute la difficulté roule donc sur l'interprétation que la Cour doit donner au mot *propriété* qui se trouve dans la section précitée ; car le contestant prétend que, dans l'esprit de la loi, ce terme ne s'applique qu'aux immeubles seulement et non aux biens mobiliers des sauvages.

Sur l'interprétation que l'on doit donné à ce mot *propriété*, l'opposant citera :

Pothier, Droit de domaine de propriété, vol. 9, p. 102, No 3. (Ed. de 1845, M. Bugnet.)

Jacob's Law Dictionary Vo Property, col 2, 6e et 8e, al.

Petersdorf's Abridgment, vol. 14, Vo Property, note au bas de p. 84, où l'on trouve la définition suivante du mot *propriété* : " Property may be defined any thing possessing exchangeable value, and is either *real or personal*.....Estate in ordinary discourse, is applied only to land ; but in law, obtains the same signification as *property*, and may be either *real or personal*."

Toutes ces autorités s'accordent à dire que le mot *propriété* s'applique indistinctement aux meubles comme aux immeubles.

Reste maintenant à savoir si l'Acte des sauvages de 1876, s'applique à l'opposant et s'il a droit de l'invoquer. ,

L'opposant n'hésite pas à répondre affirmativement, puisque cette loi a été promulguée expressément pour la protection de tous les sauvages de la Puissance du Canada : ce qui est exprimé en toute lettre, dans la section 1re du dit acte.

Cette cause fut plaidée le 17 mai 1878, et le 22 du même

mois, la cour rendit son jugement, par lequel elle déclara bien fondée l'opposition du dit Samuel Watzo et lui en accorda les conclusions avec dépens.

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Opposition maintenue.

J. G. D'Amour, pour l'Opposant ;

Duhamel et Associés, pour le Contestant.

SUPERIOR COURT, QUEBEC.

1878.

Coram McCORD, J.

IRVINE vs. DUVERNAY *et al.*

LIBEL—PUBLICATION OF—DECLINATORY EXCEPTION.

The publisher of a newspaper at Montreal who mails there copies of his paper, containing libellous matter, to a number of individuals and to public reading rooms in Quebec, held to publish that matter in Quebec.

Per curiam.—This is an action of damages for libel, brought against the proprietors of the "*Minerve*" newspaper.

It is met by a declinatory exception founded on the grounds 1st That the defendants are not domiciled within the jurisdiction of the Court ; 2dly That they have not been personally served within that jurisdiction, and 3dly That the cause of action did not originate in this district but in that of the domicile of the defendants, and that the publication of the libel, if any, took place at Montreal.

The first two of these grounds suffer no contestation and the only question arises upon the third.

The facts which give rise to this question are notorious and are admitted in the record.

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The defendants mail their paper at Montreal addressed to a great number of subscribers and to public reading rooms in Quebec.

That they published their newspaper in Montreal is certainly true, but this is no ground of declinatory exception because it is equally true that they also published it in the city of Quebec.

They are charged with having published a libel in Quebec. This is the real cause of action. The fact of their having caused the libel to be inserted in the newspaper at Montreal, as the plaintiff himself alleges, is an additional fact which in no manner diminishes his right of action, for that right is complete without it; the mere publication of a libel being a sufficient cause of action.

The simple question comes to this,—does a person who mails in Montreal libellous matter to a number of individuals and to public reading rooms in Quebec, who receive and read the same, publish that matter in Quebec.

I am of opinion that he does and are borne out by decisions in England which would seem to have been adopted in the United States.

Greenleaf, on Evidence vol. 3, No. 173, p. 148, says: “The *publication* must be proved to have been made *within the county* where the trial is had. If it was contained in a newspaper printed in another State, yet it will be sufficient to prove that it was circulated and read within the county. If it was written in one county and sent by post to a person in another, or its publication in another county be otherwise consented to this is evidence of a publication in the latter county.”

This opinion is principally founded on the English case of *Rex v. Watson*, and is given in Greenleaf's 3d vol. which treats specially of evidence in criminal prosecutions, but the place where a crime is committed, in so far as regards the jurisdiction of the Court, and the place where the right of action arose in a civil case are analogous matters, and Greenleaf is evidently of that opinion for in his 2d vol. which treats of evidence in civil matters he also says No. 416 p. 368; “The sending of a letter by

"the post is a publication in the place to which the letter is sent."

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And by the post note it will be seen that he bases himself upon the English case of *Rex v. Watson*.

The case of *Rex v. Girdwood* is also in point.

I am aware that the decision in the case of *Tremblay v. White et al.*, rendered not long ago, in this district, is against me, but I am sorry that I have not been able to bring my own opinion to coincide with it.

The learned counsel for the defendants stated at the argument that it was the postal authorities who published the paper in Quebec, but these postal authorities are merely part of a machinery which the defendants knowingly made use of; they were not ordinary agents who would have had an option to act or not to act, and even if they had been such agents the defendants would still be responsible for what they themselves had done *per alium* and therefore *per se*.

Considering that the admissions filed in this case establish that the matter complained of as libellous was published in Quebec; and that the defendants were the necessary and immediate cause of such publication through the means of the post office and that the said publication is consequently their act.

Considering further that the said publication constitutes the whole cause of action in this case, and that the said cause of action therefore originated in this district, the declinatory exception is dismissed with costs.

This judgment was confirmed by the Court of Appeals, Quebec, 7th June 1878.

Holt, Irvine & Pemberton, for Plaintiff.

MacKay & Turcotte, for Defendants.

COUR DU BANC DE LA REINE.—EN APPEL.

QUÉBEC, 7 JUIN 1878.

No. 13.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.HART *et al.* et DAVID *et al.*

Décidé :—“ Que le délai prescrit par la section 41 du chapitre 40, des Statuts Refondus du Bas-Canada, (l'Acte Seigneurial) pour la production des oppositions hypothécaires, dans le cas où le fonds d'indemnité seigneuriale est encore entre les mains du Gouvernement, n'est pas fatal vis-à-vis des représentants légaux du débiteur personnel.”

Le Juge TESSIER prononce le jugement de la Cour comme suit :

La principale question soulevée dans cette cause est de savoir : si le délai de six mois prescrit par la section 40, du chapitre 41 des Statuts Refondus du Bas-Canada, dans lequel le créancier doit produire son opposition à la distribution de deniers provenant du rachat des droits seigneuriaux est fatal dans l'espèce actuelle.

Le 20 juin 1862, le cadastre de la seigneurie de Bécancour possédée par les héritiers de Samuel Bécancour Hart, fut déposé au bureau du Protonotaire de la Cour Supérieure, et avis en fut donné suivant la loi sus-citée.

Un certain montant provenant des droits casuels de cette seigneurie est restée depuis ce temps-là entre les mains du Gouvernement. Il ne fut pas produit d'opposition de la part d'aucun créancier dans le délai prescrit de 6 mois après l'avis, mais le 9 octobre 1874, Dame Phœbe David, veuve de feu Aaron Ezékiel Hart, en sa qualité de tutrice à ses enfants mineurs, et Francis L. Hart, un enfant majeur, représentants feu Aaron Ezékiel Hart, produisirent une opposition afin de conserver en leur qualité de créanciers hypothécaires sur la dite seigneurie et les droits casuels qui la représentent au montant de £266.15.2, avec intérêt du 27 octobre 1846.

Il fut préparé un ordre de distribution dans lequel les dits

Phœbe David et al., furent colloqués pour la somme de \$1233.90, ^{Hart et al.,} et cet ordre fut homologué le 15 décembre 1875. ^{David et al.,}

Les intimés fondent leur réclamation sur un acte de partage du 27 octobre 1846, par lequel le dit Samuel Bécancour Hart s'était obligé de payer à chacun de ses sœurs et frères (dont le dit Aaron Ezékiel Hart, auteur des intimés était l'un) une somme de £266.15.2, et pour le paiement de laquelle il avait hypothéqué spécialement la dite seigneurie de Bécancour et tous droits y attachés.

Samuel Bécancour Hart était donc le débiteur personnel de cette somme envers son frère Aaron Ezékiel Hart, représenté par les opposants, intimés sur le présent appel.

Par son testament le dit Samuel Bécancour Hart (25 mars 1850) légua l'usufruit de ses biens, comprenant la dite seigneurie à ses trois sœurs ou à la survivante d'elles, et la propriété à ses frères ou descendants mâles du mariage de feu Ezékiel Hart et Françoise Lazarus ses père et mère.

Il appert que deux des sœurs sont mortes, ne laissant que Delle Caroline Athalia Hart survivante et légataire universelle en usufruit de la dite seigneurie. Cette demoiselle a fait motion ou demande pour faire rejeter l'opposition des intimés Phœbe David et al., mais cette motion a été rejetée par la Cour Inférieure, ainsi que sa requête subséquente à l'encontre du dit jugement de distribution.

Le 18 janvier 1876, les appelants actuels, Ira Craig Hart et Adolphus M. Hart, avocats, tant en leur qualité individuelle que comme exécuteurs testamentaires de feu Samuel Bécancour Hart, ont présenté une requête, en apparence sous forme de requête civile ou tierce opposition, alléguant en substance que l'opposition des intimés avait été produite après les délais de 6 mois prescrits par la loi seigneuriale, section 41 du chapitre 40 des Statuts Refondus du Bas-Canada, que le jugement de distribution était illégal, que toutes les procédures étaient contraires à la loi et entachés de fraude et d'artifices, et concluant à ce que le dit jugement de distribution fut révoqué et l'opposition des intimés déboutée.

Les intimés ont contesté cette requête par une défense en

Hart et al., droit et une exception péremptoire en droit perpétuelle et une
David et al., défense au fonds en fait.

Le 10 juin, 1877, la Cour Supérieure des Trois-Rivières a maintenu cette contestation et renvoyé la requête des dits Ira Craig Hart et autres. C'est de ce jugement qu'il y a appel devant cette Cour.

Il est allégué dans ce jugement plusieurs motifs qui le justifient sur l'insuffisance des allégations de cette requête, mais le principal est que les appelants représentent le débiteur personnel Samuel Bécancour Hart ; or ils ne peuvent pas avoir plus de droits que n'en avait ce débiteur ; il n'aurait pu prendre lui-même avantage de ce délai de six mois, parcequ'en principe général si bien exprimé dans l'article 1080 du Code Civil : "Qui conque est obligé personnellement est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers présents et à venir."

Ce délai de six mois aurait bien pu être invoqué par un créancier qui aurait produit sa réclamation dans le temps fixé, mais non pas les ayant cause du débiteur personnel. Il n'est pas invoqué ni de prescription contre la créance, ce qui serait différent.

Quant aux autres objections il y en a une à l'effet qu'il n'était pas allégué dans l'opposition que l'acte de partage était enregistré, mais ce n'était qu'une matière de preuve, et sur la requête alléguant ce défaut les opposants ont allégué en réponse et ont prouvé l'enregistrement du dit acte par la production du certificat.

Il a été aussi objecté aux intérêts réclamés depuis 1846, mais il faut remarquer que la collocation ne couvre pas cinq ans d'intérêt, qui sont présumés être les dernières.

Il reste des allégations de fraude et d'artifice, mais il n'y en a aucune preuve.

Pour toutes ces raisons cette Cour est unanimement d'opinion que le jugement de la Cour Supérieure doit être confirmé avec dépens.

A. M. Hart, pour l'Appelant.

Wm. McDougall, C. R., pour l'Intimé.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

QUEBEC, 1st DECEMBER 1874.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J.,
SANBORN, J.

BELLAY and GUAY.

Held —1° That a case may be inscribed for *enquêtes et mérites*, without the filing of articulations of facts and answers, when the delay for filing the same had expired before the date of the inscription.

2° That, an interlocutory judgment, rejecting such inscription, is a judgment from which an appeal will lie.

3° That, upon a *désistement* of the judgment, without a tender of costs, the Court of Appeals will condemn the respondent in the costs of both Courts.

The facts are as follows : an action of damages for slander was instituted by the respondent, in the Superior Court, at Murray-Bay. The appellant pleaded on the 17th June, 1874 ; issue was joined by lapse of time ; and no articulation of facts had been filed on either side, on the 30th July, when the appellant filed an inscription, with notice, *aux enquêtes et mérites*, for the 27th October, 1874.

On the 27th October, 1874, the plaintiff (respondent) moved to reject the inscription as irregular on the ground that the same was made before the production of articulations of facts, and without any consent by plaintiff to the non-production of such articulations.

The Court at Murray-Bay, 27th October 1878, granted the said motion.

The defendant immediately moved for leave to appeal from this interlocutory judgment, and the plaintiff answered by producing a certificate of the Prothonotary stating that he, the plaintiff, had filed a renunciation (*désistement*) of the judgment in question.

The respondent adduced no evidence to shew that his renunciation had been accompanied with a tender or deposit of the costs.

Bellay
and
Guay.

Judgment of the Court of Appeals, 1st December 1878.

Having heard the appellant (defendant in the Court below) by his counsel, upon his motion of this day, founded upon notice duly served on the 29th day of October last, for leave to appeal from an interlocutory judgment of the Superior Court, in and for the district of Saguenay, of the twenty-seventh day of October last, annulling and setting aside an inscription *aux enquêtes et mérites*, by the said appellant made, served and filed in this cause in the said Superior Court, and having seen the authentic certificate of the Prothonotary of the said Superior Court, in and for the said district of Saguenay, produced and filed in this cause, by Messrs. Langlois, Angers & Colston, as counsel of the said respondent, to the effect that the respondent (plaintiff in the Court below), on the twenty-first day of November last, had filed in this cause, in the Court below, a renunciation to the said interlocutory judgment sought to be appealed from, and seeing also that no tender of costs hath been made in this cause, upon the present application, by the said respondent to the said appellant,—the Court now here, doth allow the said appellant, Louis Bellay, fils, to withdraw his present application upon payment by the said respondent, Joseph Guay, of the costs of the present application and of the present judgment.

John O'Farrell, for Appellant.

J. S. Perrault, for Respondent. *Langlois, Angers & Colston*, Counsel.

COUR DE CIRCUIT, 1878.
COUR DE CIRCUIT, QUÉBEC.

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MAL, 1878.

No. 5097.

Coram CARON, J.

DURAND vs. SIOUL.

SAUVAGES—SAISIE—RÉSERVES.

JUGÉ:—Que les biens meubles et effets mobiliers des sauvages résidant sur les réserves sont exempts de saisie [39 V. c. 18].

Langlois, Angers, Larue & Angers, pour le Demandeur.

Blanchet & Pentland, pour l'Opposant.

SUPERIOR COURT, QUEBEC.

27TH JUNE, 1878.

No. 525.

Coram STUART, J.

REGINA *ex relatione* O'FARRELL vs. BRASSARD *et al.*

Held:—That the Court will not order the Prothonotary to refund a deposit of \$40 made by a party under art. 497 C. C. P., to whom the deposit has been refunded, on his succeeding in review, although the judgment in review be reversed, and the judgment reviewed be afterwards re-established in its integrity in appeal.

J. O'Farrell, for Plaintiff in Prohibition.

W. C. Languedoc, for Defendants.

SUPERIOR COURT—IN REVIEW.

25th FEBRUARY 1878.

No. 408.

Coram MEREDITH, C. J., STUART, J., McCORD, J.

PACAUD vs. CONSTANT.

VENDOR'S PRIVILEGE.

The vendor of an immoveable property having registered the deed of sale on the 31st day [i. e. one day after the 30 days allowed by art. 2100 C. C.], a creditor of the purchaser obtained from him and registered within the 30 days a mortgage against the property.

Held :—That the vendor's claim was privileged, the hypothecary creditor's mortgage being without effect, as long as his debtor's title was not registered.

MEREDITH, C. J.

The contention in this case is between a vendor, who failed to register his privileged claim, within the thirty days allowed by law, and the holder of a hypothec, given by a purchaser, before he had registered his title.

The facts are briefly these. One Hodges, now represented by the party contesting, by deed dated the 30th May 1871, sold to one Constant, for \$250, payable by instalments, the property, the price of which is now before the Court for distribution. The sale from Hodges to Constant, was not registered until the 30th of the following month, and therefore one day after the thirty days allowed by the article 2100.

Constant, without having paid any part of the price of the said property, on the 28th day of June of the same year, by a deed *sous seing privé*, registered the same day, granted a hypothec to Mr. Pacaud for \$114.

The parties representing Hodges, the vendor, contend that as Constant's title was not registered, when he granted a hypothec to Pacaud, nor when that hypothec was registered, that the last mentioned hypothec, namely Pacaud's, was under the express words of the law, "without effect," when registered; and

that, the registration of a deed without effect, could not produce any legal effect.

Pacaud
v.
Constant.

The contesting parties rely on the last part of article 2098, which is in these words : " so long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs, or real rights granted by him in respect of such immoveable, are without effect."

Mr. Pacaud relies on that part of article 2100 which is in the following words : " persons conveying immoveables by sale, gift or exchange preserve all their rights and privileges by *registering the deed of alienation within thirty days* from its date, even against persons registering their rights between the dates of such deed and of its registration."

In considering the two articles of the Code just cited, it may be well to recollect, that the provision contained in article 2100, is old law, being a reproduction of the 4th and 5th sections of the 16th Vic. c. 206, which remedied a defect in the old registry ordinance ; by specifying a delay within which certain privileges could be effectually registered.

The provision, already referred to, of article 2098, on the other hand, is new law ; and was promulgated for the first time by the Code. It is therefore sufficiently plain, from the date of the two laws, that article 2100, was not intended by its framers, to interpret, or limit article 2098.

I do not however think that article 2100 has any such tendency ; nor indeed that there is any conflict between the two articles.

The object of the Legislature in passing the article 2098, was to perfect our registry system, by compelling persons, acquiring real estate, to register their titles, before making any conveyance, transfer, or hypothec of, or in relation to the real estate so acquired, and it, in consequence, enacted that " so long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him, in respect of such immoveables, are without effect."

Article 2100, it is true, assumes that persons may register

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their rights, "between the dates of such deed and its registration." But in order to register a right, one must have that right, and one cannot have a right, under a paper which the law declares is without effect.

This interpretation does not tend to nullify any part of article 2100 ; because persons may have rights to register, created by the predecessors of the purchaser, who had failed to register, but it does not follow, because persons, who have rights, may effectually register them, "between the dates of such deed and " of its registration," that therefore papers which the law declares are "without effect" can be effectually registered within the same time.

The learned counsel for Mr. Pacaud has also referred to article 2043 which declares : "A hypothec granted by a debtor " upon an immoveable of which he has *possession* as proprietor, " but under an insufficient title, takes effect from the date of its " registration if he subsequently obtain a perfect title to it ; " saving the rights of third parties."

But in the present case the debtor granting the hypothec was not in possession of the property hypothecated under "an insufficient title," and did not "subsequently obtain a perfect title to it." The case mentioned in article 2043, is therefore different from the case before us, and the rule laid down by article 2043, being an exceptional rule, cannot be extended to another and different case.

Moreover, there is no reason to suppose that the Legislature in speaking, in article 2043, of "an insufficient title," intended to speak of an *unregistered* insufficient title ; and the Legislature could not have intended, that an insufficient title, not registered, should be productive of effect, when they have expressly declared that a sufficient title, unregistered, should be without effect.

The learned counsel for the contesting party has referred us to the judgments of the Court of Appeals in *Gauthier v. Valois*, 18 Jurist. p. 27 ; and although the facts of that case are somewhat different from those of the case before us, it seems to me that the contention of the contesting parties in this case, is in accor-

dance with the judgment of the Court of Appeals, as explained by Mr. Justice TASCHEREAU in the case just cited.

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I may add, that the same learned Judge and Mr. Justice STUART, in the case of *Laterrière v. Tremblay*, refused to give effect to a deed of sale on the ground that the title of the vendor had not been registered.

To conclude, I think Pacaud's hypothec, according to the express words of the law, was "without effect," and therefore could not be effectually registered, until the title of Constant who granted that hypothec had been registered, and it seems to me that the same proceeding which permitted the registration of Pacaud's mortgage, namely the registration of the title of the mortgagor, had the effect of perfecting the *bailleur du fonds* claim resulting from it, and securing to that *bailleur du fonds* claim the right to rank in preference to the hypothec given by Constant. In other words, as the registration of Pacaud's hypothec, could not be effectually made, until the title of the mortgagor had been registered, the title of the mortgagor must in contemplation of law, be deemed the first of the two effectually registered, and therefore the vendor's privilege resulting from the mortgagor's title, should be the first paid.

But even if they ought to be considered as having been registered at the same time, the claim of the plaintiff as being founded on the most ancient deed would take precedence, under article 2130.

Pacaud & Cannon, for Plaintiff.

Aimé Beaubien, for creditors Contesting.

CHAMBRE DES JUGES.

QUÉBEC, MAI 1878.

No. 1899.

Coram CASAULT, J.*Ex parte* FRANÇOIS COTÉ,

En appel sur décision du Conseil de la paroisse de St. Raymond.

RÉVISION DES LISTES ÉLECTORALES—RÔLES D'ÉVALUATION.

Jugé:—1° Que l'on ne peut, dans un appel de la décision d'un Conseil, sur des plaintes au sujet de la liste des électeurs, ajouter au rôle par une preuve verbale, ni le compléter en prouvant l'existence de faits qu'il ne constate pas, et que la loi veut qu'il contienne.

2° Que lorsqu'un conseil municipal prend sur lui de réviser les listes, sans qu'aucune plainte ait été produite, il n'y a pas d'appel de sa décision à un juge en chambre.

3° Que le fait que le conseil aura décidé sur une plainte, (lors même que celle-ci n'aura pas été produite dans les délais fixés par la loi) suffit pour donner juridiction au juge sur l'appel de cette décision.

La requête allègue que le conseil de la paroisse de St. Raymond, à une séance tenue le deux avril dernier, sous prétexte de procéder à l'examen et révision de la liste des électeurs a, sans cause ni raison, illégalement inséré dans la dite liste le nom d'un grand nombre de personnes qu'elle mentionne, et qui, y est-il dit, n'avaient pas le droit de voter et dont les noms, lors de leur insertion sur la dite liste, n'étaient pas portés sur le rôle d'évaluation alors en force, comme propriétaire, occupant ou locataire; puis vient l'allégation suivante: "Que lors de la dite prétendue révision de la dite liste des électeurs, le dit conseil municipal a, sans aucune demande écrite faite dans les délais voulus, sans aucune autorisation à cette effet de même que sans avis et sans l'observation d'aucunes des formalités voulues pour la révision ou correction du rôle d'évaluation, or donné l'insertion des nommés susdits sur la dite liste des électeurs et que le secrétaire trésorier de la dite paroisse a, sous les

“circonstances sus-mentionnées et sans pouvoir ni autorité
 “aucuns, noté sur le dit rôle d'évaluation les noms sus-dits
 “comme ayant été entrés sur la dite liste des électeurs.”

Exparte
 Fru. Côté.

Le requérant a procédé exparte, mais, à l'enquête, la corporation de St. Raymond a comparu par un avocat qui a transquestionné le seul témoin produit, le secrétaire trésorier et qui a objecté à la preuve faite par ce dernier que des plaintes écrites avaient été présentées au conseil pour les noms à l'insertion desquels objectait le requérant et à la production de ces plaintes. Le secrétaire trésorier a aussi prouvé que le conseil avait corrigé la liste en prononçant sur les plaintes. L'objection a été réservée au mérite. Le secrétaire a produit le rôle d'évaluation et la liste des électeurs et a prouvé qu'à l'exception de cinq des noms objectés, aucuns des autres ne paraissaient par le rôle avoir les qualifications d'un électeur, c'est-à-dire être propriétaire ou occupant d'une propriété y désignée et y estimée à \$200 ou à une valeur annuelle de \$20 ou être locataire d'une propriété y désignée et y estimée à une valeur annuelle de \$20 et en même temps à une valeur réelle de \$200. Mais le secrétaire a prouvé dans plusieurs cas l'existence des faits requis, et que ne constatait pas le rôle.

Le juge lors de l'audition a déclaré qu'il avait déjà décidé et a maintenu que l'on ne peut, dans un appel de la décision d'un conseil sur des plaintes, au sujet de la liste des électeurs, ajouter au rôle par une preuve verbale, ni le compléter en prouvant l'existence de faits qu'il ne constate pas et que la loi veut qu'il contienne.

Il a dit que le rôle tel que révisé, alors en force dans la municipalité, était pour tout ce qui devait s'y trouver final, et que s'il ne contenait pas les énonciations requises par la loi, pour que les personnes dont il portait les noms eussent la qualification d'électeurs, cette omission ne pouvait pas être réparée par une preuve étrangère. L'avocat de la Corporation n'a pas prétendu le contraire. Le Juge a aussi exprimé comme son opinion et celle du Juge en Chef et du Juge STUART, que, si un conseil municipal prenait sur lui de réviser les listes, sans qu'aucune plainte eut été produite, il n'y aurait pas appel de sa décision à un juge en chambre, et que le remède contre cette illégalité serait tout autre.

Exparte
Fra. Côté.

L'avocat de la Corporation a prétendu trouver dans l'allégation de la requête transcrite textuellement ci-dessus, une assertion qu'il n'y avait pas eu de plaintes devant le conseil, et qu'il avait procédé sans aucune plainte ; il a pour cette raison objecté à la production des plaintes et soutenu que le requérant, par cette allégation, enlevait la juridiction du juge sur l'appel. Il a aussi cru trouver dans l'allégation que le secrétaire avait noté sur le rôle les noms comme ayant été inscrits sur la liste, une admission formelle que le rôle contenait les énonciations requises.

Le Juge en rendant le jugement a dit qu'il lui était impossible, ainsi qu'au Juge en Chef et au Juge STUART, qu'il avait consultés, de trouver dans la première de ces deux allégations, qu'il n'y avait pas eu de plaintes devant le conseil, qu'ils y voyaient au contraire l'assertion qu'une plainte ou demande écrite avait été produite, mais hors les délais voulus ; et qu'il était d'opinion que le fait que le conseil avait décidé sur une demande ou plainte, lors même qu'elle n'eut pas été produite dans les délais fixés par la loi, suffisait pour donner juridiction au juge sur l'appel de cette décision. Quant à l'autre objection, il a dit que l'allégation invoquée était que le secrétaire-trésorier avait entré sur ce rôle les corrections faites sur la liste, c'est-à-dire que le rôle avait été corrigé sur la liste, et non comme le veut la loi, la liste sur le rôle ; et qu'une correction du rôle par le secrétaire après la confection et la révision de la liste ne pouvait pas justifier les entrées faites sur cette dernière.

La requête originale alléguait expressément dans un autre endroit qu'il y avait eu des plaintes devant le conseil ; mais comme cette allégation ne se trouvait pas dans la copie de la requête, mise au dossier sans preuve, comme celle signifiée à la Corporation, quoiqu'il n'y eut ni défense, ni d'objection préliminaire, et que la preuve constatât l'existence des plaintes produites devant lui, et la décision du conseil municipal sur ces plaintes, le juge, en prononçant sur l'objection, l'a considérée sous son meilleur jour, en éliminant pour la décider les deux circonstances de cette allégation spéciale des plaintes et de leur production.

Bossé & Languedoc, pour l'Appelant.

Morissette & Robitaille, pour la Corporation.

VICE ADMIRALTY COURT, QUEBEC.

28TH JUNE, 1878.

THE QUEBEC, BENNET MASTER.

ACTION OF HENDRY *et al.*

In a case of collision the Registrar and Merchants having found that there was a total and not a partial loss for which the claim was made,

HELD:—1. That by reason of a reduction of the claim, either as preferred or amended, by one third, the costs of reference must be paid by the promoters ;

And 2d. Where interest on the value of the wreck for the period between collision and examination of the vessel, was not specifically allowed, there being no direct claim for it, and it appearing that there was an equivalent granted by the Registrar and Merchants in another form, an Act on Petition contesting the report in this particular over-ruled.

Hon. G. O. STUART, Judge.

This case now comes before this Court for final judgment upon a motion to confirm a report of the Registrar and Merchants, and to condemn the promoters in the costs of reference by reason of the excessive nature of their claim, reduced by the report more than one third ; and also upon an Act on Petition of the promoters claiming a modification of the report so as to allow an additional sum of \$369.34 as interest.

On the 13th December 1875, a year after a collision, a claim was filed by the owners of the *Alexandra*, the promoters, against the *Quebec*, treating the damage done to her as a partial and not a total loss, in the form of an account of expenditure amounting to \$56,574.13. As submitted to the Registrar and Merchants this claim included a sum of \$19,946.43, for demurrage. On the 4th of May 1877, almost a year and a half afterwards, this claim was modified so far as respected the demurrage, for which another was substituted including an item for consequential damages, and as an amended claim amounted to \$48,848.33. With these exceptions the account as first preferred remained the same. When the matter came before the Registrar and Merchants they, upon the evidence submitted, ignored the claim of the promoters as for a partial loss which was an entire rejection of the account for repairs, and adopted the principle of remuneration as for a total loss, and allowed but so much of the

The Quebec,
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Master.

claims, first and secondly fyled, as came to \$5738.78. Then treating the case as one of total loss, they have allowed the value of the ship, including the freight and the last mentioned sum amounting to \$45,930.66, less the value of the wreck \$13,700 viz \$32,230.66, with interest from the 10th December 1874, when the cargo could have been delivered. In this decision each party has acquiesced except as to the interest on the value of the wreck.

The promoters, by their act on petition, say that because the wreck could not have been sold for the \$13,700 until after examination in May next following the collision, they are entitled to this interest on the period between December and May, in addition to what has been allowed, viz. \$369.34.

I shall take into consideration first, the motion of the respondent for the confirmation of the report; it is "that inasmuch as the promoters, in their original claim, demand \$54,109.50 with interest, and inasmuch as by their amended claim they demanded \$48,848.33 with interest; and inasmuch as the Registrar and Merchants have reported the promoters claim at \$32,230.66, with interest; and inasmuch as in and by the said report considerably over one third of the promoters claim has been struck off, to wit, over one third of their claim as amended, and inasmuch as both the original and amended claims were and are excessive and exorbitant, and the respondents have been put to great expense in resisting them; the promoters bail be condemned to pay the respondents their costs of reference."

If the rule as to the one third were made applicable to the claim as first and secondly preferred, it is plain that the excess complained of exists; but if the addition of the interest as demanded were allowed, the one third would be defective upon the claim as amended. But this it appears to me is immaterial as I am disposed to consider the claim as first preferred the one to which the one third rule should apply and for two reasons; the first is, that it was made a year after the collision when the extend of damage was known and persisted in for that period, during which it was held over the respondents who had to meet it; and the second, that if a party after fyling an exorbitant claim could elude the penalty of costs by dropping one or more items in the form of an amended claim, the rule would be of no

use. I shall apply the observations of Dr. LUSHINGTON in the case of the *Empress Eugenie* to this; he observed: "I am of opinion that the rule of the Court touching references of damage gives a fair margin to plaintiffs; and that any relaxation of this rule would only be to encourage excessive claims, which lead to litigation. In the present case, if the plaintiffs had rightly estimated their claim, it is very possible that the defendants would have paid without more ado. I consider that the plaintiffs acting upon a mistaken view of their legal rights, have necessitated the expense of an investigation before the Registrar and Merchants, and it is my duty therefore to condemn them in the costs of the reference."

The Quebec
Bennet
Master.

As respects the claim for interest; *prima facie* it appears to be reasonable. Strictly speaking it should have been a specific claim brought under the notice of the Registrar and Merchants so as to enable this court to revise any determination of theirs. The record does not shew that it was.—On applying to the Registrar I find that in their estimation an equivalent for interest has been allowed. It appears that the Registrar and Merchants were of opinion that the promoters could not recover upon a principle of partial loss, and, regarding the case as one of total loss, relied upon the valuation of the surveyors Messrs. Dick and Simons, two of promoter's witnesses, both as to the ship and freight, and the value of the wreck as it lay in dock. Mr. Simons states in his evidence that in the spring of 1875, ships had depreciated in value to the extent of 15s. Stg. per ton, and that his and Dick's estimate of the value of the *Princess Alexandra*, in her damaged condition, was rated after the depreciation. He further states that he would have added \$1500 to the value of the wreck, had it not been for this depreciation. That is, the value of the wreck would have been \$15,200.

Instead of deducting \$15,200 as the value of the wreck, the Registrar and Merchants have deducted her depreciated value only, and have allowed interest on the balance from the time when the cargo would, in ordinary course, have been delivered, following in this respect the cases of the *Empress Eugenie* and the *Canada*. 1st. Lush.

Had they allowed interest on \$18,700, from the date of collision, until the following month of June, when it was decided

The Quebec, Bennet Master. to repair, they could not but have deducted the value of the wreck at the time of the collision, \$15,200, and the promoters would have had \$1500 less awarded them. As it is, in the \$1500, they have about \$1100, more than the six months' interest on the \$18,700, which they pretend they are entitled to.

I shall therefore not disturb the finding of the Registrar and Merchants which includes an equivalent for the interest demanded. The report liquidating the damages at \$32,280.66 with interest from the 10th Dec. 1874 till paid, is confirmed, and the Decree of this court will be entered for that amount with the costs of the action.

The motion of the respondent is allowed and the act on Petition dismissed with costs.

Ross, Stuart & Stuart, for Promoters.

Cook, for Respondents.

COURT OF REVIEW, QUEBEC.

29TH APRIL, 1876.

Coram MEREDITH, C. J., STUART, AND DORION, J. J.

TALBOT vs. BELIVEAU.

WARRANTY—FRANC ET QUITTE.

HELD:—That the purchaser of a property with warranty against "every description of trouble or eviction which may arise from whatsoever source," but whose title does not contain the clause "free from all debts and hypothecs," cannot demand a rescission of the sale in default of the removal of certain hypothecs which may afterwards appear to be a charge upon the property.

The difference between the ordinary covenant of warranty and the clause *franc et quitte*, considered.

MEREDITH, C. J.

This is a review of a judgment of the Superior Court, at Arthabaska, rendered by Mr. Justice (PLAMONDON) on the 18th February 1876.

The case comes before us on the issue between the plaintiff and the defendant *en arrière garantie*.

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The plaintiff, in the principal action, purchased under a deed of sale, containing a declaration that the *emplacement* sold was *libre de toutes dettes et hypothèques*. It appears that at the time of that sale, the property of which the *emplacement* sold formed a part, was subject to a hypothec for \$2000, created by one Louis Foisy, by deed dated the 6th July 1871, and registered the following day.

The plaintiff, in consequence, brought an action praying that the deed of sale made to him should be annulled, unless the defendant caused the said hypothec, and another mentioned in the declaration, to be discharged.

The defendant thus impleaded sued *en garantie*, his vendors Messrs. Auger *et al.*, they, in their turn, sued their vendors Messrs. Genest and Foisy, *en arrière garantie*; and, as already mentioned, it is upon the action *en arrière garantie*, that the case comes before us.

On looking at the deed of sale, upon which the action *en arrière garantie* is founded, we find that although it is made with a warranty *contre toutes espèces de troubles ou évictions, qui pourront leur survenir de n'importe qu'elle source*; yet that it does not, like the deed upon which the principal action is founded, contain the clause of *franc et quitte*. This difference was not, in any way, noticed at the time of the argument, and probably was not brought under the attention of the learned Judge in the Court below; and yet it appears to all of us, to be of essential importance.

It is not alleged, nor contended, that the creditors of the hypothecs complained of have taken, or even threatened to take, proceedings to enforce their claims; what is complained of is, the existence of those hypothecs, and it is alleged that, in consequence of their existence, the plaintiff in the principal action has been prevented from effecting a loan upon his property, and has thus been greatly injured.

Under these circumstances the principal plaintiff who purchased his property *franc et quitte*, has evidently ground of com-

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plaint. This would be sufficiently plain even if authorities could not be found on the subject, but authorities are not wanting, for instance Merlin, under the words *franc et quitte*, says "Lorsque celui qui a fait la déclaration de franc et quitte ignorait les hypothèques que ses auteurs avaient constituées sur ses biens, en ce cas il est seulement tenu civilement de faire décharger les biens des hypothèques, ou de souffrir la rescission du contrat avec dommages et intérêts." Merlin, *franc et quitte* Vol. 12 p. 353. *Nouv. Denz. Franc et quitte*, Vol. 8, p. 773. *Guyots Rep.* Vol. 7 p. 543 2d col.

But the case is different as regards the defendant *en arrière garantie*. His warranty as already mentioned, is only against "toutes espèces de troubles ou évictions." At No. 102 of his *contrat de vente*, Pothier explains the effect of this warranty in these words.

"Cette obligation renferme celle de défendre l'acheteur de tous troubles et évictions. C'est pourquoi non seulement l'éviction, c'est-à-dire le délais que l'acheteur serait contraint de faire à un tiers, de l'héritage qui lui a été vendu, donne lieu à cette action, même le simple trouble, c'est-à-dire la simple demande que donne contre l'acheteur un tiers qui prétend avoir un droit existant dès le temps du contrat de vente, de se faire délaisser cette héritage,

And at No. 282 the same author says "l'acheteur peut bien se défendre de payer lorsqu'il est troublé: mais s'il a payé avant le trouble, il ne peut demander ni la restitution du prix, ni caution pendant le procès. Même avant qu'il ait payé tant qu'il ne souffre aucun trouble, il n'est pas recevable à demander au vendeur caution du prix dont le paiement lui est demandé: Arrêt du 5 Août 1669, dans Soesse, cent. 4, chap. 4."

And Troplong, *vente*, No. 609, says: "Mais remarquez que dans les principes de l'ancienne Jurisprudence, il fallait que l'acheteur fut troublé, *dominii questione mota*," and he refers to the passage in Pothier already cited.

The law in this respect has been changed by our statute 23 Vict. c. 59, sec. 18, copied from the article 1653 of the Code Napoleon, and reproduced by article 1535 of our code, which provides "that if the purchaser of real estate is troubled or has

"just cause to fear that he will be troubled by any hypothecary or revendicatory action he shall be entitled to delay the payment of the purchase money until the vendor has removed such trouble, &c., &c." This exceptional law cannot be extended, and accordingly Troplong, No. 614, says : " Il nous reste à observer, avant d'en finir sur le droit de l'acheteur de séquestrer le prix entre ses mains, que ce serait en tirer une conclusion très-fausse que de prétendre que l'acheteur qui, ayant payé le prix, se trouve en péril d'éviction, *pourrait forcer le vendeur à le lui rendre*. Écoutons le jurisconsulte Hermogénien : Mota quæstione, interim non ad pretium restituendum, sed ad rem defendendam, venditor conveniri potest. Tant que l'acheteur, qui a payé, n'est pas dépouillé par un fait d'éviction consommé, toute son action se borne à forcer son vendeur à prendre son fait et cause."

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To resume, it seems to me plain that the plaintiff *en arrière garantie* had not, under our common law, a right to make the demand now under consideration ; and I think it equally plain, that the statute already referred to, has not conferred that right upon him, and we therefore are all of opinion that the judgment under review, which gives to the ordinary clause of warranty the effect that ought to be given to a clause of *franc et quitte*, cannot be confirmed.

The judgment in Review reverses part of the judgment of the Superior Court, and dismisses the action *en arrière garantie* with costs of both Courts.

Beaubien, for Plaintiff *en arrière garantie*.

Felton & Crépeau, for Defendant *en arrière garantie*.

SUPERIOR COURT, QUEBEC.

9th JULY 1878.

Coram McCORD, J.

CORPORATION OF LEVIS vs. THE G. T. R. CO.

Section 66 of the Act of Incorporation of the Town of Levis (36 V. c. 60) provides that *in the course of the month of June* in each year the Assessors shall deliver the Assessment Rolls to the Secretary-Treasurer, that notice of such deposit shall be given, and that during one month thereafter it shall be open to the inspection of any interested party, and during that time persons deeming themselves aggrieved by any error or omission in the Rolls shall give notice of their complaints. The Roll was not deposited within the said month of June, but in August and September.

HELD :—That the only effect of the failure to deposit the same within the specified time would be to prevent the Roll from being conclusive against persons deeming themselves injured by it, and they would have the right to set up against the claim for their proportion of the assessment, the grounds they might have urged upon the hearing of a complaint under said sec. 66. The said section being merely directory, the failure to deposit thereunder could not operate to prevent the Roll from coming into force as a whole or to render it an absolute nullity.

Per curiam.—On the 16th August 1869, "The Corporation of the town of Levis," passed a by-law for the purpose of taking \$50,000 worth of shares in "The Levis and Kennebec Railway Company," and of imposing upon the municipality the necessary taxation to pay the debentures which were to be issued for that amount.

The by-law passed through all the formalities required by law, and was duly approved by the Lieutenant-Governor on the 15th November 1869.

In virtue of this by-law, the property within the municipality has been assessed at different times, the assessments being based, as regards the sums claimed in this case, first on the valuation-roll for 1873, and secondly on a subsequent valuation-roll for 1875.

The plaintiffs now sue the defendants, as property-holders within the municipality, for their proportion of these assessments for the years 1873-74-75-76 and 1877.

The plea to the action is the general issue.

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At the argument on the merits, the defendants rested their case on the fact that these two valuation-rolls were not deposited with the secretary-treasurer, *in the month of June*, although, in fact, the first was deposited on the 18th September 1873, and the second on the 16th August, 1875.

The defendants contend that, in consequence of this failure to deposit the rolls at the time specified, they never came into force, and that the assessments based on them are therefore null.

It is true that section 66 of the Levis incorporation act of 1872, says "that in the course of the month of June, in each year, the assessors shall deliver the rolls to the secretary-treasurer, that notice of the deposit is to be given, and that, during one month thereafter, they shall be open to the inspection of any interested party, and that, during that time, persons, deeming themselves aggrieved by any error or omission in the roll, shall give notice of their complaints."

I find nothing in the act to justify my coming to the conclusion that the failure to deposit the roll, within the specified time, has the effect of preventing it from coming into force as a whole, and renders it an absolute nullity.

I believe, on the contrary, that the only effect of the failure to deposit would be to prevent the roll from being *conclusive* against persons deeming themselves injured by it, and that they would have the right, as the defendants might have done in this case, to set up, against the claim for their proportion of assessment, the grounds they might have urged upon the hearing of a complaint, under section 66 of the Levis act.

The defendants do not pretend to have been aggrieved, but merely invoke the nullity of the proceeding on a technical ground.

The learned counsel for the defence, in the factum which he has handed in, cites authorities from Dillon and Abbott; but these merely go to shew that when the law fixes a time within which *an assessment* shall be made, it cannot be made after that time,—and that where the *mode* of making improvements is prescribed by law that mode must be followed.

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I cannot see that depositing the Valuation Roll, within a given time, is any part of the mode of making that Roll; nor can I see that the strictness of a limitation of time respecting the levying of a tax, which is an important and principal matter, can be applied to a mere subsidiary proceeding, subsequent to the making of the Valuation Roll, and intended merely to give the means of redress to those injuriously and unjustly affected by it.

I consider the provisions of section 66 of chapter 60, 36 Victoria, to be merely directory and enacted for the benefit of such persons as might be aggrieved by the valuation, and not *à peine de nullité* of the Roll itself. The action is therefore maintained.

Action maintained.

Bossé, Q. C., for Plaintiffs.

Andrews, Caron & Andrews, for Defendants.

COUR DU BANC DE LA REINE—AU CRIMINEL.

MAI, 1878.

REGINA vs. JOHN SPRUNGLI.

ARRÊT DE JUGEMENT.

JUGÉ :—Sur demande en arrêt de jugement (arrest of judgment) que l'allégation dans l'acte d'accusation que le crime a été commis *sur la mer, upon the sea*, est suffisante.

CROSS, J.

The prisoner has been convicted of larceny on the sea.

The indictment against him contains four counts.

The 1st, charges him with having, on the 9th November 1877, on board the steamer *Circassian*, belonging to british

subjects, and then being upon the sea, stolen money, of the value of \$110 currency, of the goods and chattels of Chs. Ed. Leonard Jarvis.

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The 2nd, charges him with having stolen the money on board the Circassian, then being on the sea, and within the jurisdiction of the Admiralty of England.

The 3rd, charges him with having stolen the money, on board the Circassian, then being upon the sea, and within the jurisdiction of the Vice-Admiralty Court, at the City of Quebec, in Canada.

The 4th, charges him with having stolen the money on the sea.

Evidence has been taken to sustain the charge as laid in the indictment, and there is now submitted to the Court, a motion in arrest of judgment, in which nine separate reasons are given, but which in argument have been classified and reduced to two viz :

1st. That on the face of the record or indictment, it is not shewn that the Court has jurisdiction.

2nd. That it does not appear by the evidence, that the Court has jurisdiction.

The evidence shews that the offence must have been committed after the vessel left Liverpool, and before she arrived at her destination, being about two days sail from Father Point, so that it must have been on the high seas, or at sea, that the money was taken.

A point made, is that the averment charges that the money was stolen on the sea, and that it should have been, on the high seas.

It is argued that the Imperial statute 18 and 19 Vic. cap. 91 sec 21, in enacting, that " if any person being a British subject " charged with having committed any crime or offence on board " of any British ship on the high seas, or in any foreign port or " harbor, or if any person not being a British subject, charged " with having committed any crime or offence on board any

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" British ship on the high seas, is found within the jurisdiction of any court of Justice in Her Majestys Dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case, as if such crime or offence had been committed within such limits," in a measure took the place of the 12th and 13th Vic. cap. 96, which provided for the trial in the colonies, of offences committed at sea, and that it would appear by 24 and 25 Vic. cap. 94 sec. 9, that in indictments for offences so committed, the venue in the margin should be the same as the place where indicted, and the offence should be averred as committed on the high seas. The same provision was contained in 7 and 8 Vic. cap. 2 sec. 2 for the trial in England, of offences committed on the high seas, or within the admiralty jurisdiction; That the 24 and 25 Vic. really applied to cases which arose under the 12th and 13th Vic. cap. 96, and the 18th and 19th Vic. cap. 91 sec. 21. That the term high seas is a technical expression having a legal meaning, and should have been used in charging the prisoner with the offence in this case, and Bishops criminal law is cited as supporting the last proposition by the definition he gives of the term, the high seas.

I do not find that Bishop supports this theory, nor that he gives any precise definition to the term high seas. In Russel on crimes Prentices Edition of 1877 vol. 1 p. 21, he says, the high seas include any river where great ships go, where the tide ebbs and flows, and in support of this he cites *Rex v. Allen*, 1 Moody C. C. 494 and some other cases.

The early statute of 28 Henry 8 cap. 15 sec. 1, the foundation of the admiralty jurisdiction, provides for all treasons, felonies, robberies, murders and confederacies committed in or upon the sea &c.

The subsequent statutes make use of the term "high seas" without any apparent intention of thereby changing or modifying the extent of jurisdiction; "high seas" would seem to be used in a sense signifying the same as on the sea, the extent of jurisdiction being admiralty; and before statutory provision was made on the subject, it would appear from Archbold, that tried as falling within the admiralty jurisdiction, no county was mentioned in the margin as venue, but instead of it merely the

words Admiralty of England. The english statutes in providing that the offence should be averred as committed on the high seas, only referred to their own form of procedure in such cases, and to offences committed on the high seas which might be tried in England, nor does the provision in any case apply to the 12th and 13th Vic. cap. 96, or to the 18th and 19th Vic. c. 9, as regards providing for the trial of offences in the colonies, where the courts would be left to their own form of proceeding.

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In the cases cited, *Reg v. Jones & McDonald*, the averment on the high seas, seems to have been held sufficient, see 1 Denison C. C. p. 104, and that without the averment, within the jurisdiction of the admiralty, although the statute used these additional terms.

In *Reg v. Menham & Fox*, 1 Foster and Finlayson p. 809, one of the counts averred that the offence was committed on the high seas, to wit, on the River Elbe at Hamburg ; The 2nd on the River Elbe ; and the 3rd On a British ship out of Her Majesty's Dominions. The case was tried under the 17 & 18 Vic. cap. 104. It was argued that as the 7th and 8th Vic. c. 2, s. 1 & 2, gave the Court jurisdiction in Admiralty cases, provided it was averred in the indictment, wherever place was material, that the offence took place on the high seas. Baron Pollock seemed to think the provision only directory, and so ruled.

In the cases of *Reg v. Lopez & Sattler*, 7 Cox p. 431, the question was made, whether it was necessary under 18 and 19 Vic. c. 91, to have alleged that the accused was found within the jurisdiction of the trial, as by that statute it was enacted that the offender might be tried where found in England. The objection was not sustained.

It was also held in that case, that a foreigner on board a British ship on the high seas, owes allegiance to the law of England, and if he commits an offence against that law, he is triable under the statute 18 and 19 Vic. c. 91 sec. 21, by any court of Justice in Her Majestys Dominions, within the jurisdiction of which he may at the time of the indictment happen to be, provided that such court would have had cognizance of the crime, if committed within the limits of its ordinary jurisdiction.

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In *Reg v. Cunningham et al.*, 8 Cox p. 104. the prisoners, were indicted for an offence committed on board an American vessel in the Penarth Roads, British channel, three quarters of a mile from the coast of Glamorganshire being a quarter of a mile from land left dry by the tide; the venue was laid in Glamorganshire. A conviction on this indictment was sustained by the court of criminal appeal notwithstanding objection being taken to the jurisdiction.

The case of the *Franconia*, Law Journal of 1877, vol. 46, p. 28, was that of a German vessel commanded by a German, and sailing under the german flag, which in the British channel ran down and sank the British steamer *Strathclyde*, within the three miles limit of the coast, causing the death by drowning of Jessie Dorcas Young, an English subject on board the *Strathclyde*. The German captain, Keyn, was tried and convicted of manslaughter at the central criminal Court, and on a case reserved, it was held by seven Judges against six, that the Court had no jurisdiction over a foreign vessel on the high seas, and that being within three miles of the coast, gave no exclusive right of Sovereignty to Great Britain over a foreign vessel and its inmates, thus affirming in principle that as regards foreign vessels, high seas extended to the shores in England, where great ships could sail.

The jurisdiction in this case, is under the 12 and 13 Vic. c. 96, which makes no mention of high seas, but uses the terms upon the sea, and gives jurisdiction in the colony where the party is charged with the offence.

The 18 and 19 Vic. c. 91, giving jurisdiction where the party may be found, uses the term high seas, but contains no direction as to the averment of it in the indictment. Is it not then merely matter of description?

Sec. 136 of our own procedure act of 1869, 32 and 33 Vic. c. 29, enacts. "When any felony punishable by the laws of Canada has been committed within the jurisdiction of any court of Admiralty in Canada, the same may be dealt with, inquired of and tried and determined in the same manner as any other felony committed within that jurisdiction."

By sec. 15. "It shall not be necessary to state any venue

in the body of any indictment; and the district, county, or place named in the margin thereof, shall be the venue for all the facts stated in the body of indictment; but in case local description be required, such local description shall be given in the body thereof.

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Sec. 23. "No indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved &c., or for want of a proper or perfect venue."

Sec. 32. "Every objection to any indictment for any defect apparent on the face thereof, must be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards; &c. And no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer or amended under the authority of this act."

Sec. 70 states that Variances may be amended.

. Sec. 78. "No judgment upon any indictment for any felony or misdemeanor &c. &c., shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, &c., nor for the want of a proper or perfect venue, where the court appears by the indictment to have had jurisdiction over the offence."

Sec. 79. "The indictment shall after verdict, be held sufficient, if it describes the offence in the words creating the offence."

It will thus be seen that the Legislature have taken great pains to avoid the effect of merely formal objections and that when as in this case, the court certainly has jurisdiction over the offence as committed at sea or on the high seas, there is little chance of objections prevailing which go merely to the form or mode of procedure.

The place of the offence not being required to be stated, save as may be convenient for local description, is sufficiently alleged by being averred as on the sea, and if imperfectly alleged, is not a ground for arrest of judgment. There is a proviso attached to sec 21 of the 18 and 19 Vic. cap. '91 to the effect that

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If under the 18th and 19th Vic. c. 91, it might still be sufficient.

The averment "on the high seas" might be necessary if made a condition of conferring jurisdiction, or an essential ingredient in the offence, but it has not been so made.

I think jurisdiction appears on the face of the indictment and by the evidence, and that the motion in arrest of judgment must be rejected. This is the conclusion the court has arrived at, the objections taken in the motion are therefore overruled, and the motion dismissed.

TESSIER, J.

L'acte d'accusation allègue que le prisonnier a volé certaines sommes d'argent *sur la mer* dans un vaisseau anglais le 9 novembre dernier.

Par un autre chef il est accusé d'avoir ainsi volé *sur la mer* dans les limites de la juridiction de l'Amirauté d'Angleterre, et par un autre chef dans les limites de la juridiction de la Cour de Vice-Amirauté à Québec dans le Canada.

Le prisonnier a été trouvé coupable, et il propose maintenant une demande en arrêt de jugement. La principale raison invoquée est que dans l'acte d'accusation il est allégué que le crime a été commis *sur la mer* (*on the sea*) au lieu qu'il eut dû être allégué (*on the high seas*), sur la haute mer.

Pour décider cette question il est bon de dire d'abord que la juridiction de cette Cour pour une offense de cette nature, doit découler des pouvoirs qui lui ont été conférés par la législation du Parlement d'Angleterre, mais quant à la procédure à suivre pour faire et déterminer le procès, elle doit être d'après nos lois.

Il faut donc recourir au Statut Impérial de 1849, acte 12 et 13 Victoria, chapitre 96, intitulé : "an act to provide for the

"prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty."

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Par cet acte les cours dans les colonies anglaises ont le droit de s'enquérir de crimes et félonies commis sur *la mer*. Il y est dit : "If any person within any colony shall be charged with the commission of any treasons, felony, robbery, murder or other offence of what nature soever committed *upon the sea*, or in any haven, river, creek or place where the admiral has jurisdiction ... then and in every such case all magistrates, juries, judges, courts &c. in such colony shall have the same jurisdiction for inquiring of, trying and adjudging such offences... as by the law of such colony would have been had, if such offence had been committed upon the waters situate within the limits of such colony..."

Mais ce qui fait la difficulté ; c'est qu'un statut Impérial subséquent en 1855, sur la même matière, 18 et 19 Vict. chap. 91, section 21, se sert du mot *high seas*. "If any person...not being a british subject, charged with having committed any crime on board any british ship on *the high seas* is found within the jurisdiction of any court of Justice in Her Majesty's Dominions, such court shall have jurisdiction to *hear and try* the case as if such crime or offence had been committed within such limits. Provided that nothing contained in this section shall be construed to alter or *interfere* with the Act 12 and 13 Victoria chap. 96."

Ce dernier proviso laisse en force l'acte 12 et 13 Victoria chap. 96 déjà cité. C'est en effet en vertu de ce statut que l'acte d'accusation a été formulé, et c'est une règle de droit : que si l'acte d'accusation s'est servi des mots propres contenus dans le statu, cela suffit. Je suis donc d'avis que l'acte d'accusation est suffisant. D'ailleurs le mot *mer* a une acception plus étendue que le mot *haute mer*. Si l'acte d'accusation eut allégué que l'offense a été commise sur la *haute mer* une objection plus forte eut pu être faite, parce que le vol dont il est question a eu lieu sur le vaisseau dans son voyage de Liverpool à venir au débarcadère de Rimouski, où le prisonnier a laissé le vaisseau. Or le vol aurait pu avoir lieu durant les quelques heures qui ont précédé le passage du vaisseau dans le fleuve St. Laurent, et n'aurait-on pas pu dire que cette partie du

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fleuve n'est pas compris dans les mots *high seas*, quoiqu'il soit compris dans le mot *sea* ?

Maintenant nos lois de procédure qui s'accordent avec celles d'Angleterre sur ce point, n'exigent pas d'autre chose quant à la *venue*, que ce qui est exigé par la section 15 du chap. 29 de l'année du règne 32 et 33 Victoria. " Il ne sera pas nécessaire d'indiquer une venue dans le corps de l'acte d'accusation ; mais le district, comté ou lieu indiqué à la marge sera considéré comme étant la venue pour tous les faits consignés dans le corps de l'acte d'accusation ; mais si une désignation de lieux est requise, cette désignation de lieux sera donnée dans le corps de l'acte d'accusation."

Dans la section 82 il est dit : " Que nulle motion pour arrêt de jugement ne sera reçue à raison de quelque défectuosité dans l'acte d'accusation, dont l'on aurait pu se prévaloir par exception ou qui aurait pu être amendée sous l'autorité du présent acte."

Et dans la section 78 il est dit : " Que nul jugement ne sera arrêté... à raison de tout défaut dans la désignation de la venue, s'il paraît par l'acte d'accusation que la Cour avait juridiction quant à l'offense."

Et dans la section 136 il est dit : " Lorsqu'une félonie a été commise dans la juridiction de quelque Cour d'Amirauté en Canada, il en sera disposé, et l'enquête, le procès et la décision pourront avoir lieu de la même manière qu'à l'égard de tout autre félonie commise dans cette juridiction."

Il est admis que le crime a été commis dans les limites de la juridiction de l'Amirauté sur un vaisseau anglais, et d'après l'application de ces règles, la Cour est d'opinion que la venue indiquée dans la marge de l'acte d'accusation, ainsi que la description, dans le corps de l'acte d'accusation, du lieu de la commission de l'offense *sur la mer* sont suffisants.

En conséquence la Cour rejette la demande en arrêt de jugement.

Autorités citées, Archbold, page 31.

Regina v. Lopez, Dearsly & Bell Reports, Crown cases, p. 525.

Regina v. Lesley, Bell's Reports, p. 220.

Regina
v
Sprungli.

Après cela le prisonnier fait de longues observations, sur la demande qui lui est faite de dire pourquoi sentence ne serait pas prononcée contre lui.

Le Juge TESSIER prononce alors la sentence comme suit :

John Sprungli,

You have been found guilty of a very serious crime, committed on the sea in a british ship coming from Liverpool to Quebec. The Court here sitting, in whose jurisdiction you have been found and arrested, has the right by the laws of England and by the laws of Canada to enquire into the offence committed by you.

After a long trial in which you have been defended with great ability, you have been found guilty by a jury of respectable and impartial jurymen. The Court approves of this verdict.

You had been admitted as a first class passenger on board a first class steamer "The Circassian," you were admitted to associate with the other passengers in a friendly way, and you have chosen some of these to make them the victims of your plunder. You must have by some very extraordinary and skilful means introduced yourself during the night into their state rooms, and there taken from their clothes and in their trunks a great part of the money they were possessed of.

Afterwards you were bold enough to converse with them about their losses. You had contrived to conceal the stolen money in secret recesses of your trunk, believing that you would be able to escape discovery ; but our Police Officers have shown themselves equal to the detection of any skilful expedients resorted to by most experienced criminals.

It is necessary for the vindication of society and the security of passengers on board of our lines of Steamers to punish such crimes in an exemplary manner.

This court condemns you to be incarcerated in the Penitentiary for 5 years, that is to say 3 years for the larceny of Mr.

Regina v. Sprungli. Oliver's money, and 2 years to commence after the lapse of the first three years, for the larceny of Mr. Jarviss' money.

Andrew Stuart, for the Crown.

R. Alleyn, Q. C., for the prisoner. With him, *T. C. Casgrain*.

COURT OF REVIEW, QUEBEC.

31st DECEMBER 1877.

Coram MEREDITH, C. J., CASAULT, J., CARON, J.

ASTILL *et vir* vs. HALLÉE.

FOREIGN MARRIAGE—COMMUNITY—REAL ESTATE.

HELD, by the S. C.—That real estate acquired in this Province by consorts domiciled here but who had contracted marriage in a foreign country, falls under the operation of our law governing community of property between man and wife.

HELD, in Review, reversing the judgment of the S. C.—That according to the well established jurisprudence of the Parliament of Paris for more than two centuries before that tribunal was abolished, a community of property was held not to exist between persons who, having been domiciled and having married, without contract, in a place where the law of community did not exist, afterwards established their domicile and acquired property in a country where the law of community did exist; and the same jurisprudence, founded upon a doctrine approved of by the most esteemed commentators on the Code Napoleon, has been invariably observed by the Courts of the Province of Quebec, the law of community being considered rather as a *statut personnel* than as a *statut réel*.

There is no conflict between the judgments in *Rogers v. Rogers* and *Sweetapple v. Gwill*. The decision in *Saul and his Creditors* was to a considerable extent founded on Spanish law, and, as was held in *Rogers v. Rogers*, cannot be regarded as a precedent by which the Courts of Quebec may be guided.

The plaintiffs inscribed in review from a judgment of the Superior Court rendered the 19th October 1877, at Quebec, as follows :

STUART, J.

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v.
Hallé.

This is a petitory action by the plaintiff as heir-at-law of her father, claiming a lot of land in the parish of St. Henri.

The plea sets forth that in 1872, after the death of the plaintiff's father, her mother sold to one Pelletier half of the lot of land claimed, and as tutrix of plaintiff, leased the other half; that Pelletier in 1874 sold his half to the defendant, and assigned to him the lease of the other half. He prays *acte* of his readiness to divide the lot of land with the plaintiff; he alleges moreover that plaintiff's mother was proprietor of the half she sold to Pelletier as *commune en biens* with her late husband.

The evidence establishes that the father and mother of the plaintiff were married at Burlington in 1856 without entering into any ante-nuptial contract of any kind; that in the same year they came to St. Henri; the father died in 1871; that plaintiff's mother has continued to reside there since, and that she is married to a Canadian residing in that parish; at the time that the plaintiff's father acquired the lot of land in question (1866) he was domiciled in St. Henri.

In Vermont, in the absence of any contract, no community exists between husband and wife in regard to property, there is no nuptial partnership.

It has been urged that the domicile of the father and mother being in the State of Vermont at the time of marriage, that the laws of Vermont regulate the matrimonial rights of the parties in the lot of land in question

On the other hand, it is contended that the laws of Vermont are inapplicable: that the title to the lot of land is regulated by the laws of this Province; that inasmuch as no covenants were made it is a *conquet* of the community of property which the law establishes in such cases; that half became the property of the mother upon the dissolution of the community by the death of the father, which is now legally vested in the defendant and never belonged to the plaintiff; that the defendant possessed the other half as lessee for the plaintiff.

The case presents an abstract question of law of an impor-

Asiili et vir
v.
Ilalioo. tance not easily over-estimated to all emigrants to our shores, and not without its influence for good or evil in the future of the country at large.

I now proceed to enquire into the legal effect of a marriage in the State of Vermont upon the title to the lot of land in question, acquired in this Province after the parties had removed from Vermont and were domiciled here. Do the laws of Vermont continue to dispose of property acquired by the parties after they have ceased to be domiciled in that State, or is the title to the lot of land in question governed by the law of this Province?

It is necessary to have in mind the general principles which govern the subject of personal and real statutes, one upon which Continental Jurists have displayed so much research and ingenuity with such diversity of conclusion. On the subject of personal statutes there is a difference of opinion among jurists but there is none upon the real statute. A personal statute is a custom which clothes the person with a capacity or incapacity which does not change with every change of abode, but which he carries with him wherever he goes.

The Scottish law which is much like our own has adopted the rule that in cases of community, where there is no written contract, the law of the domicile of the parties, at the death of either, regulates the disposal of the property of the parties. Such a rule would operate justly if adopted here, and Lord Eldon is reported to have said in *Lushly vs. Hogg*, which was a case founded on a contract, that if there had been no such contract, the law of England (notwithstanding the domicile of the parties at the time of their marriage was in France) would have regulated the rights of the husband and wife who were domiciled in England at the dissolution of the marriage by death. Our law establishes a community of property between a husband and wife as a consequence of marriage, if no special covenants have been stipulated between the parties, so that where there is no marriage contract there the law establishes a community of property in the husband and wife.

The plaintiff's mother by the fact of the marriage was put by the law of her domicile under the disability of making any contract with her husband, and of holding and acquiring any

property during her marriage; the disability is personal and local, affecting her so long as she was domiciled in Vermont, but so soon as she changed her domicile for one in this Province she ceased to be subject to the disabilities of the law of that State, and she became liable to the disabilities, if any, and to the advantages which the law of her new domicile imposes and confers upon all married women living under its influence and protection—privileges that it would be cruel to deprive her of, if it be optional in the Courts to do so or not. It is beyond question that the plaintiff's ancestors became domiciled in this Province more than a quarter of a century ago—it is well to enquire what was the effect in law of this change of domicile on their part. Hertius, Paul Voet, John Voet, Burgundus, Rodenburg, Pothier, Merlin, Kent and Story hold the opinion that the law of the new domicile must, in all cases of a change of domicile, govern the capacities and right of property of married women as well as their obligations, acts and duties. The incapacity of the plaintiff's mother to hold and acquire property during marriage while domiciled in Vermont, ceased on her becoming domiciled in this Province, and that incapacity cannot be invoked against her.

*Asiil et vir
v.
Hilice.*

The authorities establish that each nation has complete jurisdiction and power over all persons and all things real and personal within its limits—that no nation can by means of its laws affect or govern persons or property beyond its limits, that personal statutes extend themselves everywhere, and a man is deemed everywhere to be affected by the *law of his domicile*—that the law of the place where immoveable property is situate regulates the quality and disposition of it; that when a person has changed his domicile and adopted another the power of the first fails and yields its authority to the law of the new domicile—that conflicts can only arise where the law of the domicile differs from that where the real property is situate.

Applying these principles to this case the plaintiff's father and mother were domiciled in the State of Vermont when married, which domicile they abandoned and even acquired a domicile in this Province long before their acquisition of the lot of land in question; consequently the incapacity to acquire property, under which the plaintiff's mother labored so long as she was domiciled in Vermont, ceased upon her acquiring a domi-

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cile in this Province, and she became invested with the capacities conferred upon all married women by the law of her new domicile.

As the parties were governed by the personal statutes of Vermont, which created a disability in the wife to make any contract with her husband and to hold property so long as they were domiciled there, and as with the change of domicile by the parties from the State of Vermont to this Province, the plaintiff's mother shook off all the disabilities which attached to her in Vermont and became clothed with all the rights and privileges of the laws of this Province of married women without a contract; seeing that the parties by the change of domicile ceased as completely to be bound by the laws of the State of Vermont as if they had never been subject to them; that the parties by establishing their domicile in this Province came to be, and are subject, to the statutes, real and personal, of the same, and there can be no conflict between these and the statutes real and personal of the State of Vermont; that the law of acquests and gains during marriage is a real, and not a personal statute, and governs marriages made in other countries, where the parties reside in this, as to all property acquired after their removal here; that the plaintiff's mother became owner of one undivided half of the lot in question by the death of her husband; that she sold it, and it is now the property of the defendant; that the defendant was the tenant of the plaintiff for the other half, has always been ready to divide the same with the plaintiff, and is so still, and that the defendant has fully substantiated his plea, and the plaintiff hath failed to substantiate her demand, the present action must be dismissed.

The case having been set down for a review of the foregoing judgment, *Andrews*, Q. C., was heard for the plaintiffs and *Drouin* for the defendant.

MEREDITH, C. J.

James Astill and Sarah Bockus, the parents of the female plaintiff, were on the 5th April 1850, married at Burlington, in the state of Vermont, where, it is expressly admitted, they then had their domicile; and where it is proved community of property between married people. as it exists under our law, is

unknown. On this subject the evidence of Mr. Toney E. Wales, the judge of the Vermont Court of probate is conclusive. Astill et vir
v.
Hallée.

Some time after their marriage, defendants allege in the same or the following year, Mr. and Mrs. Astill established their domicile in this province. In 1866, Mr. Astill purchased in his own name the real estate, in this District, now in dispute in this cause.

After his death in 1872, his widow claiming to have been *commune en biens* with him, sold one half of the last mentioned property to one Pelletier, from whom the defendant holds it, and the question to be decided is, as to the validity of the conveyance so made by the widow Astill.

The general question which this case presents is doubtless of very great importance; more particularly in this country, where a very considerable proportion of all deeds affecting real estate in it, have been executed by persons, or by the children of persons, who, at the time of their marriage, were domiciled beyond the limits of this province, and, if we were to be guided merely by general principles, in the decision of that question, it would doubtless present much difficulty; but, it is to be recollected that the defendant, as representing the widow Astill, rests his claim on article 220 of the custom of Paris; and that it is by the provisions of law contained in that custom, that this case is to be decided, and, when this is borne in mind, I do not think there can be much doubt as to the judgment we must render.

Dumoulin, (1) who wrote in the early part of the sixteenth century, is one of the earliest and most strenuous supporters of the doctrine that, in the absence of an express contract, the community is to be considered as originating, not merely from the law, but from the tacit agreement of the parties, on marrying, to adopt the law of the matrimonial domicile, and that such agreement has the same effect as an express agreement, with respect to property subsequently acquired by the parties, wherever it may be situated.

(1) Dumoulin, conc. 53.

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v.
Haliée.

On the other hand, d'Argentré, (1) who wrote toward the close of the sixteenth century, strongly combated the opinion of Dumoulin, and maintained that the community is derived from the law alone, and that there is no such tacit agreement as Dumoulin imagines, that the utmost which can be deduced from the circumstance of the parties having married without any express contract, is their simple assent to submit to the law of the matrimonial domicile; that such assent cannot give to the law an obligatory force which does not in fact belong to it; nor cause a law which is a real law, and therefore limited to the country in which it exists, to extend its power to another country.

These conflicting opinions, and the opinions by which they have been respectively supported, are given in the language of the writers, and at considerable length, both by Story and Burge (2) but I do not think it necessary to transcribe them here; because the question being discussed, viewed as one of french law, has I think been considered as settled, at least since the publication of the views of Pothier on the subject.

That great man, who had, as Toullier says, the glory of being *le guide principal des rédacteurs du Code Napoléon*, (3) and of whose authority, even in England, it was said by Chief Justice BEST, "it is as high as can be had next to the decision of a Court of Justice in this country."—Pothier, I say, having the opinions of Dumoulin and d'Argentré, and of their respective supporters before him, condemned that of d'Argentré and adopted that of Dumoulin, who, he says, had been contradicted *mal à propos* by d'Argentré.

Pothier, at No. 11 of his *Traité de la Communauté*, says :
 " La communauté légale ou coutumière, est celle qui a lieu entre
 " des conjoints par mariage, quand ils ne s'en sont pas expli-
 " qués, et qui est composée tant en actif qu'en passif, des choses
 " dont cette loi déclare qu'elle doit être composée.

" Quoique cette communauté soit appelée légale, ce n'est

(1) Argentré, art. 218, pp. 611, 612, 613, 614.

(2) Burge, Vol. 1, p. 605, 610 & seq. Story, Conflict, p. 135 & seq.

(3) Toullier, II Vol. No. 95, p. 119.

" pas néanmoins, comme l'observe Dumoulin, la loi qui en est
 " la cause immédiate ; elle n'est pas formée, dit cet auteur, *vi*
 " *ipsius consuetudinis, immediate, et in se.* La cause immédiate qui
 " produit et établit cette communauté, est une convention qui
 " n'est pas, à la vérité, expresse et formelle, mais qui est vir-
 " tuelle et implicite, par laquelle les parties, en se mariant,
 " quand elles ne se sont pas expliquées sur les conventions ma-
 " trimoniales, sont censées être tacitement convenues d'une
 " communauté de biens, telle qu'elle a lieu par la coutume du
 " lieu de leur domicile, suivant ce principe de droit : *In contrac-*
 " *tibus tacite veniunt ea quæ sunt moris et consuetudinis.*

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Cette communauté de biens n'est appelée légale que parce
 " que c'est une communauté sur laquelle les parties, par cette
 " convention tacite, s'en sont entièrement rapportées à la loi.

" De là il suit que lorsque des personnes domiciliées sous
 " la coutume de Paris, ou sous quelque autre coutume sembla-
 " ble, se sont mariées sans faire de contrat de mariage, la com-
 " munauté légale qui a lieu en ce cas, suivant la coutume de
 " Paris, entre ces personnes, s'étend à tous les héritages qu'elles
 " acquerront durant leur mariage, fussent-ils situés dans des
 " provinces dont la loi n'admet pas la communauté lorsqu'elle
 " n'a pas été stipulée."

At No. 12 the same learned writer says : " la disposition
 " des coutumes qui admettent une communauté entre homme et
 " femme, sans que les parties s'en soient expliquées, *n'est pas un*
 " *statut réel* qui ait pour objet immédiat les choses qui doivent
 " entrer en communauté ; c'est plutôt un statut personnel,
 " puisqu'il a pour objet immédiat de régler les conventions que
 " les personnes soumises à la coutume, à raison du domicile
 " qu'elles ont dans son territoire, sont censées avoir eues sur la
 " communauté de biens, lorsqu'elles se sont mariées.

And at the following number the same author says : " 13.
 " vice versa, lorsque deux personnes domiciliées dans le
 " Lyonnais, (1) s'y sont mariés sans stipuler de communauté, la
 " femme *ne peut être fondée* à prétendre, en vertu de la coutume
 " d'Orléans, droit de communauté dans un héritage situé *sous*

(1) Where the law of community did not exist.

Antill et vir “ *la coutume d'Orléans*, (1) que son mari a acquis durant le
 l'italia. “ mariage ; car ce n'est pas la coutume d'Orléans qui im-
 “ prime par elle-même la qualité de conquête aux héritages
 “ que des personnes mariés acquièrent durant le mariage ; ce
 “ qui leur donne cette qualité, c'est la convention implicite de
 “ communauté, que sont censées avoir eue, des personnes, qui
 “ étant, lors du mariage, domiciliées sous la coutume d'Orléans,
 “ sont censées être convenues de se marier selon la coutume
 “ d'Orléans.

“ Mais ces Lyonnais, qui, lors de leur mariage, n'avaient
 “ pas leur domicile à Orléans, mais à Lyon, ne peuvent être censés
 “ avoir eu aucune convention de communauté, puisque le droit
 “ observé à Lyon, lieu de leur domicile, suivant lequel ils sont
 “ censés avoir voulu se marier, n'en admet pas, lorsqu'elle n'a
 “ pas été expressément stipulée.”

Auzanet, (2) Duplessis, (3) Ferrière, (4) Bacquet, (5) Lebrun, Guyot, (6) Merlin, (7) may all be referred to as supporting the opinion of Pothier. And, seeing this, I would not in an ordinary case, deem it necessary to refer to the decisions of the Courts on this subject. But in consequence of the importance of the legal question, which this case presents, I deem it right to show that the rule laid down by Dumoulin and adopted by Pothier and by, I may say, all the most esteemed french Jurists, is beyond all doubt, in accordance with the well established jurisprudence of the Parliament of Paris, by which I think we ought to be guided.

Merlin, (8) mentions an arret of the 1st March 1549, and two of an earlier date, as establishing the rule. Brillouin refers to an arret of the 3rd March 1549, probably one of those mentioned by Merlin, and to one of the 15th March 1567, as deciding “Que

(1) Where the law of community did exist.

(2) Auzanet, Ed. of 1708, p. 155.

(3) Duplessis, Ed. 1754, p. 353.

(4) 3 Vol. Ferrière Folio, Ed. 1754, p. 12.

(5) Bacquet, Droits de Jus. ch. 21, No. 72.

(6) Guyot, Rep. 4 Vol. Communante, p. 185.

(7) Merlin, Rep. Communauté de Biens, Brussels Ed. 1825, Vol. 5, p. 108.

(8) Merlin, same Vol. pp. 104 and 105.

"communauté entre mari et femme doit se régler, selon la coutume du domicile, que le mari avait lors du mariage contracté, et non du domicile qu'il avait lors de la dissolution du mariage." But the details of the cases referred to are not given with sufficient fulness to enable us to judge satisfactorily of their importance.

Asstiff et vir
V.
Haïlé.

The earliest reported arret which has come under my notice, as to what, in the absence of an express contract, are to be considered the matrimonial rights of the wife, is the arret (1) of the 26th March 1588, reported by Louet.

In that case the question was "Si on réglerait une communauté entre mari et femme, selon la coutume du domicile, que le mari avait lors du mariage, ou du domicile que le mari avait lors de la dissolution du mariage."

It was contended that the case had been fully discussed, *solennellement disputée*, in a suit between *les Messieurs de l'Hopital* and one *Teragueard*, in which where parties who had married at Lyons (where there is no community of property) afterwards settled at Paris (where the law of community does prevail) it was held, that there was no community between them at either place.

It was also said that the same question had been subsequently decided as reported by Montholon.

And that Maître René Chopin mentions that a similar arret had been rendered the 28rd May 1572, and the reporter says "On a suivi ces arrêts après en avoir demandé avis aux chambres."

Thus, it appears to have been decided as early as 1588, in accordance with several previous arrêts, that, in the absence of an express contract, the matrimonial rights of the wife are to be determined with reference to the domicile of the husband at the time of the marriage.

The next arret to which I propose to refer, is that of the 18th February 1700 (2).

(1) Recueil d'arrêts notables [folio Ed. of 1743] Vol. 1, p. 214, by Louet.

(2) Journal des audiences Ed. of 1754 Vol. 7. p. 57.

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V.
H. 166.

It appeared that Claude Thomas, and Françoise Sonmy, who contracted marriage in Normandy (where the community of property does not exist) afterwards established their domicile in Paris: After the death of the husband, the widow claimed from her son: 1st. "La part que la coutume de Normandie donne dans les conquêts, 2. Moitié dans les conquêts de Paris. " Jugé qu'elle n'aura que les tiers dans les *meubles* de Normandie, *le surplus adjugé au fils.*" And the reporter adds—"cela confirme la règle que la communauté doit se régler suivant la loi du domicile du mari."

I now come to the arret of the 18th April 1878, referred to in Guyot's Repertoire as *un arrêt bien connu pour avoir jugé nettement la question*, namely, the question respecting which Dumoulin and Argentré had differed, as to whether the right of community is a real or a personal right.

In that case it appeared that in 1655, a marriage took place between François Auger and Charlotte Houlé. Senlis was the place of their birth, and of their matrimonial domicile; and the community of property prevailed there. On the death of the wife, her collateral heirs, in conformity with the law of community, claimed a partition of the estate wherever situated, and particularly of property in Normandy. Their claim was resisted on the ground that there was no express contract that the community should exist. In reply to this objection, they relied on the tacit or implied contract, and by the judgment of the Court it was held that there was no distinction between an express and an implied agreement, and that the operation of the law of community ought, in both cases, to be determined by the same principles; and accordingly it was adjudged that the partition should take place.

This case is fully reported in the 7th Vol. of the Journal des Audiences, pp. 56 and 57, and in the note to the report reference is made to the previous decisions on the subject.

The arret under consideration, that of the 8th April 1718, was rendered according to the conclusions of the celebrated Lamoignon, then avocat general, and afterwards premier president, and is very generally referred to, and for the purposes of the present discussion, it is particularly interesting in consequence

of the losing party having been represented by Froland the author of the "Memoires sur les Statuts," a strong supporter of d'Argentré, and who has been referred to in the present case, as having opposed the opinion of Dumoulin, as *subtilités d'esprit, des idées, des chimères*. It may therefore be reasonably presumed that he cited all the earlier decisions tending to support his client's case. As to this point the reporter, after mentioning the writers cited by Mr Froland, says: "Il se prévalait de l'arret de Lamberty, et il tachait de faire valoir celui de Vannelli, il citait des décisions de la cour de Brabant et par rapport à la coutume de Normandie il opposait les articles 329 et 330 de la coutume, et il citait l'arrêt de Fervagues et celui d'Onpoy."

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Hallée.

The decisions of the court of Brabant, which, Troplong says had with reason "la réprobation constante du Parlement de Paris," (Troplong, mariage No. 25,) are not so far as I know to be found in this province, but we know that as early as 1698 (1) the court at Brabant adopted the opinion of d'Argentré, that of Dumoulin being sanctioned by the appellate court in Belgium. (2)—But what Froland had to establish, and what we have to consider, is not what was thought on this subject by the Dutch and Belgian courts, but what was the jurisprudence respecting it in the *Parlement de Paris*; and as to that jurisprudence, the learned advocate so far as I can see, cited but two arrêts, the arret Lamberty, and the arret Vanelli.

I have not been able to ascertain whether the arret Lamberty was ever reported and, if it was, there is no copy of the report within my reach. The only notice of it, that I have seen, is that in the *Journal des audiences*, which is in these words: "7 sept. 1548. Lamberty, Lyonnais, marié à Paris, y meurt. Il fut jugé que la veuve n'aurait part dans les acquets faits à Lyon, pays exclusif de communauté." So far as I know, this judgment, rendered 330 years ago, is the last, if not the only one by which the doctrine of d'Argentré was sanctioned in the *Parlement de Paris*, and, indeed, unless Lamberty had his actual domicile in Paris, at the time of his marriage, which

(1) Burge Vol. 1, p. 611.

(2) Burge 1st Vol. p. 603.

although probable does not appear, the arret Lamberty would be of no importance.

The arret Vanelli, also referred to by Froland, will be found reported at great length in the 3rd Vol. Journal des audiences p. 242 (1). It was contended that, in that case, the court held that the matrimonial rights of the wife were to be decided, with reference to the law, not of the place of the husband's domicile, at the time of the marriage, but according to the law of the place of the marriage, and that, on that account, the widow was prevented from taking the one half of certain land, acquired during the marriage, by her husband, within the custom of Paris. But Auzanet (2) shews that the ground on which the claim of the widow Vanelli was rejected, was that there was a contract, and although that contract did not expressly declare there should be no community, yet that, from all the clauses of the contract, considered together, it was sufficiently plain that a community of property was not contemplated.

This seems to have been made apparent in the argument which preceded the arret of the 8th April 1788, as the reporter says "il (M. Froland) se prévalait de l'arrêt Lamberty, et il tâchait *de faire valoir en sa faveur celui de Vannelly.*"

Guyot also gives an arret of the 27th July 1745, as being in accordance with the doctrine of Dumoulin. In that case it appeared that M. Quenet and Marguerite Auviray, who were domiciled in *Normandy* married there. During their marriage they acquired real estate in Paris. After the death of the husband, the widow claimed one half of the Paris property on the ground of her having been *commune en biens* with her husband. The claim having been resisted by the heirs of the husband, Guyot says *la question fut traitée très amplement par d'habiles jurisconsultes, devant la grande Chambre du Parlement de Paris.* And the claim of the widow was rejected.

In this case it does not appear that the parties ever had a domicile in Paris, which may be deemed of importance by some persons.

(1) See also, Recueil d'arrets notables. Louet folio Ed. of 1742, Vol. 2. p. 215.

(2) Auzanet on the custom of Paris, fol. Ed. of 1708, art. 220, p. 155, see also Duplessis folio Ed. of 1754 p. 353.

Guyot and Merlin also mention an arret of May 1846, as having decided the same point, but the facts are complicated, and the report not quite clear as to the points decided.

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I shall next refer to the *acte de notoriété* of the Chatelet de Paris, bearing date the 4th April 1873, and as it is very long I give the points decided by it as they are to be found in that valuable work "*La collection de décisions nouvelles.*" "Les conventions du mariage quoique tacites, ne sont pas moins irréfragables que les conventions expresses, consignées dans un contrat. Les uns et les autres ne peuvent être changées après la célébration. De là il résulte que si les époux changent leur domicile matrimonial, en un nouveau domicile, cette mutation ne peut rien changer à l'état de leur communauté, laquelle continuera d'avoir lieu suivant la loi du premier domicile." And as one of the reasons of that rule, the editors of the work say: "Il ne doit pas être permis aux époux de changer les conditions de leur mariage par une mutation de domicile; si cela était en leur pouvoir tout l'avantage serait du côté du mari, que la femme est obligée de suivre dans tous les lieux du Royaume qu'il juge à propos de fixer son domicile." (1)

On reference to the *acte de notoriété* itself it will be found that it expressly declares the "*droit de communauté contractée est pur personnel,*" and the compiler of the work in a note says: "*Les maximes attestées par le présent acte de notoriété sont évidemment certaines.*" (2)

With the *acte de notoriété* and the arrêts, to which I have referred, before us we cannot be surprised that Guyot in his repertoire published a few years before the French Revolution, says "il y a longtemps que cette opinion" namely "*que le statut qui admet, exclut ou prohibe la communauté ne soit personnel, n'a plus de contradicteurs à Paris.*" (3)

(1) Nouveau Denizart et Collections de décisions nouvelles, Vol. 4, p. 708, Communauté de biens, § IV, No. 5. This *acte de notoriété* is also referred to in Ferrière's Cout. de Paris, fol. Ed. of 1714, Vol. 3, pp. 10 and 11.

(2) Actes de notoriété, E.I. of 1759, pp. 264-5-6.

(3) Guyot's Repertoire, Vol. 4, p. 183, [1784] verbo communauté.

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And the same observation is to be found in Merlin's Repertoire published very shortly after the Revolution. (1) And yet it is to be recollected that the defendant's claim rests on the contention that the law regulating "*acquets et gains* made during marriage is a real and not a personal statute."

Having thus seen what was the law on this subject in the Parliament of Paris as long as it existed, bearing in mind that the law of community is still the general rule in France, (2) it may be well to see what is the opinion entertained on this subject by the most esteemed commentators on the Code Napoleon.

Toullier (3) says that if foreigners *domiciled in France*, intermarry there, without an antenuptial contract, a community of property will exist between them. The same doctrine is laid down by Rodière and Pont: "un français qui se marie à l'étranger, sans contrat, n'est censé marié sous l'empire de la communauté française, qu'autant que la future a pu supposer qu'après la conclusion du mariage, son mari entendait retourner en France. Dans tous les cas, en un mot, c'est la commune intention des époux qu'il faut uniquement rechercher." And in support of this opinion, the learned writers cite Toullier, Duranton, Armand Dalloz and Zachariae.

It does not however appear to have occurred either to Toullier, or to Rodière and Pont, that a community of property could exist between married persons, merely on the ground of their establishing their domicile in France after their marriage.

Rodière and Pont, (4) Odier, (5) Troplong, (6) and Battus, (7) in their treatises on the contract of marriage, all agree in saying that in the parliament of Paris, the opinion of Dumoulin finally and completely prevailed.

(1) Merlin Rep. Vol V, p. 180.

(2) Toullier, Vol. 12, p. 149, No. 91.

(3) Art. 1393 Code Nap. | Rodière et Pont, p. 24, No 33.

(4) Rodière et Pont contrat de mariage Vol. 1, p. 25, No. 34.

(5) Odier, contrat de mariage Vol. 1, p. 57, No. 47.

(6) Troplong, contrat de mariage Vol. 1, p. 39 No. 24

(7) Battus, Traité de la com, Vol. 1, p. 116, No 71.

The words of Troplong are : " mais la jurisprudence française *a condamnée d'Argentré* : et les efforts de Froland, pour rajeunir l'opposition du jurisconsulte Breton (Argentré) sont restés impuissants. Le parlement de Paris a resté tellement ferme au pacte tacite de communauté, qu'elle ne trouvait plus de contradicteurs."

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And Battus, in his traité de la communauté Vol. 1, p. 116, No. 71, says " ainsi l'opinion de Dumoulin qui répute personnel le statut de la communauté et l'étend sur tous les biens, a prévalu."

I shall now briefly advert to the judgments of our own courts on this subject.

The first case in which the question appears to have been referred to is *Roy v. Yon*, in 1812.⁽¹⁾ We have not a full report of the case ; but from chief Justice SEWELL'S note of it, published by Messrs. Lelievre and Angers, it appears to have been held that a communauté de biens is by law presumed, until the contrary is shown, *if the parties were married in Canada*: (1)

In the case of *Languedoc v. Laviolette*, it was held that where persons domiciled in Lower Canada, marry in the United States without ante-nuptial contract, the rights of the parties will be governed by the law of Lower Canada. This case does not seem to me of much importance as it did not present any conflict between the law of the matrimonial domicile and the law of the place where the persons married subsequently acquired property.

But in the next case to be referred to, *Rogers v. Rogers*, decided at Montreal in 1848, it will be found that the question to be determined in this cause was fully discussed and adjudicated upon in the clearest terms. The words of the judgment are : " considering that there never was or could be a community of property between the father and the mother of the parties in this cause, they having married in England, the place of their domicile, and no contract of marriage having been previously entered into, and that the transferring of their domicile to

(1) 2 Rev. de Leg p. 78.

Astill et vir " Lower Canada, where they died, could not have the effect of
Halée. " establishing such a community of property between them,
 " contrary to their presumed intention at the time of their
 " marriage ; " and, thereupon the plea of the defendants which,
 in effect, was the same as the plea before us, was dismissed.

The judgment in this case was rendered by Chief Justice ROLLAND, Mr. Justice DAY and Mr. Justice SMITH.

The plaintiff was represented by Mr. Lafontaine, afterwards Chief Justice of the Court of Appeals, and Mr. Berthelot, afterwards a Judge of the Superior Court. Mr. Johnson, now president of the Superior Court at Montreal, was one of the counsel for the defendant, so there can be no doubt that the question now being considered, was fully discussed in that case.

Exactly the same doctrine was held by the Superior Court at Quebec, in May 1850, in the case No. 660, *Dinning v. Gillis*. The considerants of the judgment as taken down by me, in my note book at the time, are " considering that the parties plaintiff
 " and defendant intermarried in that part of the United King-
 " dom, called Ireland, and that, in consequence, there is no com-
 " munity of property between them, as alleged in the plaintiff's
 " declaration ; the Court doth dismiss the present action."

The Judges in the last mentioned case were Chief Justice BOWEN, Mr. Justice, afterwards Chief Justice DUVAL, and myself.

It appears that in this district the same question was, in the year 1855, ruled in the same way in *Gilmour v. McLeod & McKeigney*, T. S. In that case certain real estate was seized as belonging to a widow. She and her deceased husband, at the time of their marriage, were domiciled in Scotland, but afterwards settled in this country. The children claimed the property on the ground that no community ever existed between their parents ; and their opposition was maintained. The judgment as recorded, does not show clearly that such was the point decided, and the record is not complete ; but Mr. Andrews, Q. C. and Mr. O'Farrell, the counsel in the case, agree in saying that the facts and decision in that case are as above stated ; so that there cannot be any doubt on the subject.

The question as to whether the matrimonial rights of the

wife, in the absence of an express contract, are to be regulated by the matrimonial domicile, was also fully considered, in the district of Three Rivers in the year 1858, in the case *McDougall v. Seymour and Ross*, opposant.

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The judgment in that case shows clearly what was the opinion of the presiding Judge, Mr. Justice D. MONDELET, as to the main question now under consideration.

The considerants of the last mentioned judgment are as follows :

“ Considérant, qu’attendu que le mariage du défendeur et de l’opposante a été célébré dans cette partie du Royaume-Uni de la Grande-Bretagne et d’Irlande appelée Angleterre, où la communauté de biens entre mari et femme n’est point reconnu et n’existe pas suivant la loi du dit pays, et considérant que c’est la loi du domicile qu’avaient les dites parties à l’époque de leur mariage et qu’ils ont conservé plusieurs années depuis, n’étant venu se fixer en Canada que longtemps après, qui doit régler leurs droits matrimoniaux, et que par les lois de l’Angleterre, de même qu’il ne pouvait y avoir de communauté de biens entre le défendeur et l’opposante, il ne pouvait de même exister une séparation de biens, et qu’en conséquence la séparation de biens prononcée entre le défendeur et l’opposante par le jugement de cette cour en date du vingt-trois février mil huit cent cinquante-cinq, est un jugement fondé sur l’erreur et comme tel, illégal et nul, la cour prononçant la nullité du dit jugement pour autant que le demandeur y est intéressé, le met au néant et adjugeant que la dite opposante n’a pu acquérir aucun meuble, effet mobilier ou aucune chose quelconque pour elle-même, en vertu du dit jugement de séparation ; mais que les effets mobiliers et bois de construction saisis en cette cause sont la propriété du défendeur, et ont été saisis en sa possession, déclarant la dite saisie tenante, bonne et valable, déboute la dite opposante de son opposition, avec dépens.”

The registers and records of the Superior Courts for this district from 1857 to 1872, having been burned, I may mention that in a copy, in my library, of the 3rd Vol. of the *Revue de Législation*, containing the report of *Rogers v. Rogers* already

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Hallée. referred to, I find, in the margin of that report, a note in these words "Judge MORIN held same doctrine, this day, December 18th 1858, in *Power v. Kelly*, Q. S. C.

We thus see that at least five judgments of the Superior Court can be cited in favor of the contention of the plaintiff, and, so far as I am aware, no Canadian precedent, or semblance of such precedent can be urged in support of the contrary doctrine.

It has however been said, and I believe correctly, that the question now being considered has never been formally adjudicated by our Court of Appeals.

But that shows, at any rate, that the five judgments to which I have alluded, were acquiesced in by the parties concerned, which is, probably, in part attributable to the fact that there was not a dissenting opinion, nor so far as I know, a doubt expressed by any of the Judges, in any of those five cases.

But although the question to be decided in this case, has not been formally adjudicated upon by the Court of Appeals, it is not the less true, that in the very interesting and important case of *Connolly v. Woolrich*, the views of the Judges of that Court are very clearly stated as to the main question in this cause.

In that case the controversy turned mainly on the validity of an alleged marriage contracted in 1808, by Connolly a native of Lower Canada, with an Indian woman, in the North West Territory, where the community of property between husband and wife does not exist.

Connolly returned to this province with his Indian wife, and some of their children, and acquired here real estate to a considerable extent.

It was therefore a part of the plaintiffs case to show that there was a community of property between Connolly and his Indian wife.

The judgment in the court below was rendered by Mr. Justice MONK, and upon the question as to whether a community of property resulted from the Indian marriage, that learned Judge

observed.—“ It is in my opinion beyond doubt as a matter of law, that Connolly, during his absence in the North West country, though that absence was prolonged through many years, did not lose his domicile of birth; that he never acquired one at Rivière-aux-Rats. I think, moreover, that even his matrimonial domicile, such as it was, did not change or supersede the one of origin. In that case, whatever may have been the law which prevailed at Rivière-aux-Rats, a community of property existed between him and his indian wife, from 1803 the date of their marriage. (1)

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The judges in appeal where Chief Justice DUVAL and judges CARON, BADGLEY, MACKAY and LORANGER.

The last named judge regarded the indian marriage as invalid, and therefore did not consider the question now before us; as to the views of Mr. Justice BADGLEY there can be no doubt. His words are as follows. “ Having retained his domicile of origin which recognized *communauté de biens*, and which being a *statut personnel* accompanied him wherever he might go to be married, he therefore married under the regime of the law of community according to the law of Lower Canada, which could only be avoided by an express ante-nuptial contract stipulating exclusion of community between him and Suzanne.

“ The law of his domicile therefore regulates the rights of the *conjoints* in the community, and that community once formed and established by law, is irrevocable and inviolable and the *conjoints* of themselves cannot derogate from it. (2)

Mr. Justice MACKAY, observed “ It is certain that Connolly never had *animum manendi* at Rat River. It is certain that he always retained the intention of returning to Lower Canada,” and after saying that the law of England was inapplicable to the case, and after referring to the passages in Pothier, hereinabove given at full length, the learned judge held that, as Connolly had his domicile in Lower Canada, at the time of his marriage, his widow was to be considered as having been *commune en biens* with him.

(1) 11 L. O. J. p. 263.

(2) Rev. de Leg. p 370.

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According to the report Chief Justice DUVAL and Mr. Justice CARON concurred in the opinions expressed by Mr. Justice BADGLEY and Mr. Justice MACKAY.

It is to be observed that Mr. Justice MONK, and the two Judges in appeal, who spoke on the subject, deemed it essential to show that Connolly, *at the time of his marriage*, had his domicile in Lower Canada, and, *on that ground, and on that ground only*, held that a community of property resulted from the marriage. But it does not appear to have occurred to any of the learned Judges in *Connolly v. Woolrich*, that the circumstances of Connolly and his Indian wife having come to this province, *after their marriage*, and having for many years lived and acquired property here, could give the Indian woman, when a widow, a right to claim, as having been *commune en biens* with Connolly, one half of the property so acquired in this province; and yet such, in effect, are the pretensions of the defendant in this cause.

It is also to be observed that the doctrine that the law of community is rather a *statut personnel* than a *statut réel* is fully adopted by the judges in appeal, Mr. Justice BADGLEY expressly saying that the law of community is a *statut personnel*.

The assent given by Mr. Justice CARON to the opinions expressed by Judges BADGLEY and MACKAY in this case; the judgment of Mr. Justice MORIN, in *Power v. Kelly*, and the judgment in *Rogers v. Rogers*, pronounced by Judge DAY, leave no room for doubt as to the opinions of the three learned judges who framed our own civil code, as to the question to be decided in this case.

Indeed it will be found that the articles No. 1260 and 1270 of that code, to which my attention has been drawn by my brother CASAULT, now give force of law to the opinion of Pothier, adopting that of Dumoulin and condemning that of d'Argentré.

It was, I bear in mind, contended that the judgment rendered by Mr. Justice SMITH, in *Sweetapple v. Gwilt*, was opposed to the previous judgment in *Rogers v. Rogers* in which he concurred. That contention is supported by the Three-Rivers judgment above referred to; but notwithstanding that judgment, I cannot regard the decisions in *Sweetapple v. Gwilt* and in *Rogers v. Rogers*, as being opposed to each other.

According to the marginal abstract in *Sweetapple v. Gwillt*, ^{Astili et vir} the point decided was "that although there is no community of ^{v. Hallée.} property, according to the custom of Paris, between parties married in Upper Canada, their then domicile, without any ante-nuptial contract, yet an action *en séparation de biens* will be maintained in favor of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada."

With reference to the judgment just quoted, it may be observed that it is not unusual in marriage contracts to stipulate that there shall be no community; without adding that the parties shall be separated as to property (1). The effect of such a contract is to leave to the husband the right of enjoying all the property of the wife, *ad sustinenda onera matrimonii*. But, although there could be no community under such a contract, it is I think certain that, if the misfortunes or misconduct of the husband rendered it necessary, for the protection of the interest of the wife, she would have the right to an action such as was instituted by the plaintiff in *Sweetapple v. Gwillt* so as to secure to her an administration of her own property. (2)

Indeed I find that article 1417 of our code expressly admits that there may be a *séparation de biens*, where the consorts have stipulated there shall be no community.

Much stress was laid by the defendants on the interesting judgment in Louisiana, in the case between *Saul and his creditors*.

But that judgment was fully considered and reviewed by the Court of Queen's Bench at Montreal, when the case of *Rogers v. Rogers* was determined; and in the course of a very able and exhaustive judgment rendered by Mr. Justice DAY, on that occasion, he observed, as I find by an entry made in my note book, at the time: "as to the decisions in Louisiana, those founded on the code (of that state) of course cannot influence us; and as to those before that code, they appear to have reference to the law of Spain, which differs from ours."

As supporting the statement thus made by Mr. Justice DAY,

(1) Pothier communauté No 461 and 464, Civil Code 1416.

(2) Pothier communauté No. 463, Gnyot Rep. Verbo séparation, Vol. 16, p. 206, Civil Code art. 1417.

Astill et vir I may refer to the concluding remarks of Mr. Justice PORTER in
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Ballée. the judgment, *Saul and his creditors.*

" Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. " We know of no question better settled in *Spanish jurisprudence*; " and what is settled there cannot be considered as unsettled " here. The jurisprudence of *Spain* came to us with her laws. " We have no more power to reject the one than the other. The " people of Louisiana have the same right to have their cases " decided by that jurisprudence, as the subjects of Spain have, " except so far as the genius of our government or our positive " legislation, has changed it. How the question would be de- " cided in that country, if an attempt was made there on the " authority of French and Dutch Courts, and lawyers, to make " them abandon a road in which they have been travelling for " nearly three hundred years, we need not say."

If those who were governed by the laws of Spain, could not be required to abandon the jurisprudence of that country, " on the authority of French and Dutch Courts and lawyers," Canadians who have been governed by the custom of Paris, ought not on the authority of a judgment, founded mainly on Spanish law, to abandon their own jurisprudence, from which so far as I know there has not been a single deviation since the *arret de Lamberty* in 1548.

In the foregoing remarks, I have viewed this case as if for its decision it would be necessary to adopt one or other of the rules laid down by Dumoulin and Argentré respectively, and it would be necessary to do so, if the parties having, without previous contract, married where community of property existed, claimed real estate acquired in a place where the law of community does not exist. But the present is the opposite of the case just supposed; for, here, parties married where the law of community does not exist, claim real estate acquired where the law of community does exist, and to determine this case it appears to me only necessary to consider the contention of the defendant, with reference to the law upon which it is supposed to be founded.

The contention of the defendant is, in effect, that as Mr. and Mrs. Astill, who were married in Vermont, where the law

of community is unknown, after their marriage established their domicile, and acquired real estate in Lower Canada, therefore the widow Astill, as having been *commune en biens* with her husband, was owner of half of the real estate so acquired.

Now according to the law of this province, a community of property (speaking in general terms) is a partnership of all the moveable property which the consorts possess *on the day of the marriage*, and also of all the moveable and immoveable property acquired by them during the marriage. According to the same laws, such a partnership cannot exist, unless the parties have agreed to it expressly or tacitly. In this case it does not appear that there was any such agreement, either express or tacit, and therefore, in obedience to our own law, we must declare that the defendants have not proved that Mrs. Astill was *commune en biens* with her husband, as they allege.

Again, according to article 220 of the Custom of Paris, and according to No. 1269 of our code, community commences from *the day of the marriage*; and according as well to our code as to the code Napoleon, "the parties *cannot stipulate that it shall commence at any other period.*" (1)

In this case it is contended that the alleged community commenced about a year after the marriage, and therefore, according to the plain terms of the law upon which the defendant rests his contention, we must hold that it cannot be maintained.

Furthermore, it was expressly declared by art. 282 of the custom of Paris, and is declared in equally plain terms by article 1265 of our Code, that, subject to a few exceptions, consorts cannot in any manner confer benefits *inter vivos* upon each other. The contention of the defendant is that, by the fact of Mr. and Mrs. Astill having established their domicile in this province, she thereby acquired the rights of a partner in property previously belonging to him. But under our own law that claim cannot be maintained. In thus rejecting the contention of the defendant, I am not influenced by a consideration of the disabilities to which Mrs. Astill was subject by the laws of Vermont; what I say is, simply, that a married couple coming

(1) C. N. Art. 1399.

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to this country, and establishing their domicile here, cannot do that which a married couple, who had passed all their lives here, could not do, either tacitly or expressly; that is they cannot *after their marriage* establish a community of property between them. But it is said a general community is not required, all that is wanted is to let the wife, as a *femme commune*, take half of the real estate, acquired in this country, during the marriage. The answer is that there cannot be a *femme commune*, without a community; and, that, in the absence of an express contract, there cannot be any community other than a legal community, such as I have already described. Hence it follows that the proposal to give to the wife one half of the real estate, without declaring her *commune*, must be rejected, as being utterly at variance with all the provisions and principles of our law on this subject.

It was, I bear in mind, also contended that great injustice would be caused, in cases such as the present, by the rejection of the rule contended for by the defendant, but on the other hand as great, and perhaps greater injustice would be caused in other cases by the adoption of that rule. For instance let us take the case of a merchant, married and domiciled in England, afterward coming to this country, with a considerable capital of his own earning invested in his trade. According to the contention of the defendants, if in the case supposed, and after the parties had acquired a domicile here, the wife were to die, the children, if any, could at once claim one half of the capital which the father had so earned and invested in his trade; and if there were no children, the case would be still worse, for the half of the husband's property would pass to the relations of his deceased wife, and this although those relations could not have claimed one shilling had the parties remained in England.

But it is not for us to enquire whether our law as to the matter under consideration, is just or unjust; our duty is to ascertain what the law really is, and as to that point, according to my view, there is not much room for doubt.

It was also contended that according to the laws of the state of Vermont Mrs. Astill was entitled to a certain homestead right, which she ought to have if we hold she was not *commune* according to the laws of this province.

But the pleadings in this cause are not sufficient to raise any question as to the supposed homestead right ; moreover the evidence establishes that that homestead right did exist at the time of Mrs. Astill's marriage

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In conclusion I shall briefly recapitulate the points I have endeavored to establish.

They are :

That according to the well established jurisprudence of the parliament of Paris, for more than two centuries before that tribunal was abolished, a community of property was held not to exist between persons, who having married without contract, in a place where the law of community did not exist, afterwards established their domicile, and acquired property, in a country where the law of community did exist.

That according to the same jurisprudence the law of community was considered rather as a *statut personnel* than as a *statut réel*.

That the same jurisprudence has been invariably observed by the courts of this province.

That the doctrine upon which that jurisprudence is founded is approved of by the most esteemed commentators on the code Napoleon.

That there is no conflict between the judgments in *Rogers v. Rogers* and *Sweetapple v. Gwillt*.

That the Louisiana decision between *Saul and his creditors*, was to a considerable extent, founded upon Spanish law : and, as was held in *Rogers v. Rogers*, cannot be regarded as a precedent by which we may be guided.

It is not without regret that I have taken up so much time in explaining my views in this case : but I could not do otherwise, consistently with my sense of duty. We have to review a judgment, rendered after diligent research, and with the utmost care, by a judge whose opinions are received by every one with the highest respect. Besides this the question to be decided,

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although very far indeed from new, is, as I have already said, of the last importance; more especially in this country, peopled as it has been to a great extent by immigration, and if, as I believe, there has been a well settled jurisprudence on this subject, by which the public and their legal advisers have been guided, then it is only too plain, that a disturbance of that jurisprudence, could not fail to be attended with widespread confusion and injustice.

For these reasons, I think the judgment under review must be reversed; and I have the less hesitation in arriving at that conclusion, because, although that judgment is in accordance with the opinions of many distinguished writers on international law, no precedent, I believe, can be found for it, in the parliament of Paris, since 1548; nor under the code Napoleon; nor under the custom of Paris, since it became the law of this country.

Judgment reversed.

COUR DU BANC DE LA REINE.—EN APPEL.

SEPTEMBRE, 1878.

No. 14.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J

DOUCET et ST. AMAND.

CHOSE JUGÉE—PROHIBITION.

Jugé:—Que sur des procédures en prohibition prises à l'encontre d'un jugement rendu par la Cour des Sessions de Quartier pour infraction à la loi des licences, lorsque le jugement prononcé par la Cour de Révision confirme celui de la Cour Supérieure, constituant *chose jugée* contre la partie principale,—le magistrat qui a défendu en prohibition n'aura pas le droit d'appel, malgré qu'il n'ait pas lui-même inscrit en révision.

Le 16 décembre 1875, l'intimé, sur la poursuite de la Corporation de St. Ambroise de la Jeune Lorette pour vente sans

licence de liqueurs enivrantes, fut condamné par l'appelant (juge des sessions de la paix) à une amende de \$50 et les frais. Doucet et St. Amand.

L'intimé fit alors émaner un bref de prohibition à l'encontre du jugement prononcé en faveur de la corporation, et mit en cause l'appelant, accusant ce dernier de malversation et d'excès de juridiction, et demandant contre lui les dépens.

La Corporation de St. Ambroise et l'appelant produisirent chacun une défense.

Le 9 juillet 1877, la Cour Supérieure présidée par Son Honneur le Juge STUART, accorda le bref de prohibition avec dépens, tant contre les défendeurs que contre l'appelant.

La Corporation de St. Ambroise porta la cause en Révision, et la majorité de cette Cour confirma le jugement rendu par le Juge STUART.

L'appelant interjeta plus tard appel du jugement prononcé par la Cour Supérieure le 9 juillet 1877, donnant pour raison de son appel que le jugement de la Cour de Révision ne constituait pas *chose jugée* contre lui.

Il prétendit en outre qu'il avait un intérêt personnel dans la cause, vû qu'il avait été accusé de malversation par l'intimé, et que ce dernier avait demandé les dépens contre lui.

La Cour d'Appel rendit le jugement qui suit :

" Considérant que la Cour Supérieure a, par son jugement, prohibé l'exécution du jugement rendu par l'appelant en sa qualité de Juge des Sessions de la paix, le 16 décembre 1875, et que ce jugement de la Cour Supérieure, ayant été confirmé par trois juges siégeant en révision, est devenu chose jugée quant à la Corporation de la paroisse de St. Ambroise de la Jeune Lorette, partie principale dans la cause ; "

" Et considérant que l'appelant, en sa dite qualité de Juge des Sessions, n'avait aucun intérêt personnel à soutenir la validité de son jugement à l'encontre des procédés en prohibition qui ont été adoptés par l'intimé, et qu'il n'avait non plus aucun intérêt à appeler du jugement rendu par la Cour Supérieure, surtout après que ce jugement eût été confirmé par la Cour de Révision ; "

Doucet
et
St. Amand.

“ Et considérant que le jugement que cette Cour pourrait rendre sur cet appel serait sans effet, puisque dans tous ces cas, le jugement rendu par l'appelant ne pourrait être exécuté après le jugement qui a été rendu par la Cour siégeant en révision ; ”

“ Mais considérant que l'intimé a provoqué l'appelant à contester ses procédés, en portant contre lui, dans sa requête en prohibition l'accusation injurieuse de malversation qui n'est nullement justifiée ; ”

Cette Cour renvoi l'appel de l'appelant, mais sans frais.

Andrews, Caron & Andrews, pour l'Appelant.

Suzor & Tessier, pour l'Intimé.

COUR SUPÉRIEURE, QUÉBEC

19 SEPTEMBRE, 1878.

No. 1007.

Coram CASAULT, J.

HAMEL v. BOURGET.

DAME BABY,

Opposante.

ET

HAMEL,

Contestant.

HYPOTHÈQUE—PRESCRIPTION.

Jugé :—Que l'hypothèque, n'étant que l'accessoire d'une dette, n'a pas d'existence sans elle, et que partant, l'extinction par la prescription, de l'action personnelle éteint par contre-coup l'action hypothécaire, même dans le cas où cette dernière a été conservée par des actes interruptifs.

CASAULT, J. :

Dame Eliza Anne Baby veuve de feu l'Honorable Casgrain,

demande d'être colloquée sur les Nos. 2, 3, 4 vendus en cette cause pour \$400 et un an d'intérêts, étant le sort principal et les arrérages de rente sur une constitution du 20 novembre 1818 par Michel Martin en faveur de Amable Dionne et Pierre Casgrain appliquée sur un lot de terre qui n'est pas vendu en cette cause ni possédé par le défendeur. L'opposante est devenue propriétaire de cette rente qui avait fait plusieurs mains auparavant, par acte du 29 septembre 1848. A l'époque où Martin a consenti cette constitution de rente, il était propriétaire des 3 lots susdits qui ont été grevés d'une hypothèque générale par l'acte authentique créant la rente constituée, et qui à cette époque (avant la création des bureaux d'enregistrement) avait cet effet. Le 2 septembre 1833, Maurice Gauvreau et son épouse, et J. B. Martin détenteurs des trois dits lots consentirent titre-nouvel à Dame Marie Justine Casgrain, alors propriétaire de la rente. Le 12 février 1842, Pierre Dessaint, devenu propriétaire des dits 3 lots, en fit autant, reconnu que ces 3 lots étaient hypothéqués au paiement de la rente et s'obligea personnellement de la payer à défaut du débiteur principal; puis il les vendit le 19 mars 1861 à Jean Bte. Roy, sans l'en charger. Mais Roy, le 20 septembre 1862, consentit titre-nouvel en faveur de l'opposante et le 7 mars 1864 il donna les mêmes lots en contre-échange à son vendeur Pierre Dessaint qui le 6 mai 1867 les donna à Isaïe Dessaint son fils. Ils ont été vendus le 21 novembre 1876, sur la veuve de ce dernier. Le demandeur a contesté l'opposition et y a opposé la prescription de 30 ans et celle de 10 ans.

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Quant à celle de 10 ans, Roy ayant consenti titre-nouvel, elle n'aurait pu commencer que le 7 mars 1864, date de l'échange entre lui et Pierre Dessaint, qui a fait de nouveau ce dernier propriétaire de ces lots qu'il avait lui-même vendus à Roy le 19 mars 1861; mais Dessaint qui avait lui-même consenti titre-nouvel en 1842 n'avait pas la bonne foi requise pour cette prescription. 2 LeRoux prescription No. 928 dit que la preuve de la mauvaise foi peut résulter de ce que " l'acquéreur a été avant la vente qui lui a été faite, partie dans un acte où le droit d'un tiers a été formellement rappelé." Or ici Pierre Dessaint avait, par un acte formel et authentique, réservé l'hypothèque, et s'était même personnellement obligé au paiement de la rente.

Troplong, prescription, après avoir dit au No. 930 que la remise entre les mains de l'acquéreur des titres du vendeur dans

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lesquels le droit des tiers se trouve écrit, établit sa mauvaise foi, continue No. 931. "A la connaissance des titres on peut assimiler la connaissance extrinsèque que l'acquéreur aurait eu du droit d'autrui avant acquisition. Cette connaissance une fois établie est censée se continuer de plein droit ultérieurement, et celui qui combat la prescription a rempli sa tâche en prouvant son existence."

Et les codificateurs dans leur rapport sur l'art. 95 de la prescription dans le projet de ce code. "Il faut remarquer que la mauvaise foi légale s'inférant de la connaissance du droit d'autrui, etc.".....

Le demandeur, à la plaidoirie orale, a, sans toutefois renoncer à sa prescription décennale, répondu qu'il n'en avait pas besoin, plus de 30 ans s'étant écoulées depuis la création de la rente et aussi depuis la reconnaissance de l'hypothèque par Pierre Dessaint et son obligation personnelle consignées au titre-nouvel de 1842. La vente en cette cause n'a eu lieu qu'en 1876.

Dessaint n'était tenu à la rente que comme détenteur de trois des immeubles qui y étaient hypothéqués. Il n'était obligé que de reconnaître l'hypothèque, il y a joint sans nécessité, dans son titre nouvel de 1842, une obligation personnelle; mais cette obligation personnelle n'a pu dans tous les cas que l'obliger pendant les 30 ans qui se sont écoulés sans nouvelle reconnaissance ou autre acte interruptif depuis qu'il l'a souscrite.

Il est bien vrai que, quant à l'hypothèque sur ces trois immeubles, le titre-nouvel de Roy (20 septembre 1862) a interrompu la prescription qui avait couru jusqu'alors. Mais l'hypothèque n'est pas indépendante de la dette, et n'a pas d'existence sans elle; elle n'est qu'un accessoire et doit tomber avec l'obligation personnelle à laquelle elle est attachée. Or la rente a été créée le 20 novembre 1818, et l'opposante n'a ni allégué ni prouvé aucune reconnaissance ou interruption par le débiteur ou ses héritiers depuis l'époque de la vente faite en cette cause. La dette existait depuis 58 ans révolus, c'est-à-dire depuis 28 années de plus que requis pour la prescrire.

Troplong, Priv. et hyp. No. 878 bis. "Mais si la prescription a éteint l'obligation personnelle et l'action qui en découle, l'action hypothécaire sera éteinte par contre-coup. L'hypothèque

que étant l'accessoire de l'obligation personnelle, doit nécessairement tomber avec celle-ci ; sans cela on rentrerait dans les principes peu rationnels de la loi *cum notissimi*. Il faudrait se tenir à cette décision, quand même l'on aurait assuré par des actes interruptifs l'action hypothécaire. (La loi *cum notissimi* dont parle ici Troplong, donnait à l'hypothèque consécutivement 40 ans d'existence. Mais la jurisprudence a de tout temps refusé ici l'application de cette règle du droit écrit, et le code art. 2247 a sanctionné et reconnu comme loi cette règle de la jurisprudence.) Troplong, prescription No. 659.—Pont, Priv. et hyp. No. 1245.—7 Taulier, p. 398.—Riom, 11 messidor an XI.—Sirey 7, 1, 1113.—do 2 avril 1816, Sirey 17, 2, 373.—do 6 juillet 1830, —Sirey 33, 2, 647.—Cass. 25 avril 1826, Sirey 26, 1, 433.—do 12 février 1829.—Metz, 5 juillet 1822.—2 Grenier, No. 519.—Dalloz, Vbis. Priv. et hyp. p. 424, No. 19.—2 Zachariae, p. 226, note 2.—Marton, No. 1349.—21 Duranton, No. 279.—Riom, 7 novembre 1838.—Cass. Sirey 39, 1, 428.—Merlin, Rép. v. Interrup. de prescription No. 12.—Contra Grenoble 2 juin 1831, Sirey 32, 2, 622.

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CC. 2081, No. 5 : " l'hypothèque est éteinte par l'extinction absolue de la dette à laquelle elle était attachée." *Absolue* est pour le cas d'un paiement avec subrogation, qui n'éteint pas absolument la dette et ne fait que substituer un nouveau créancier à l'ancien.

JUGEMENT :

Considérant que la rente dont l'opposante réclame le sort principal et les arrérages a été constituée le 20 novembre 1818 pour le prix d'un lot de terre qui n'est pas vendu en cette cause, et que les trois lots sur le prix desquels elle demande à être colloquée n'y ont été hypothéqués qu'en vertu de l'hypothèque générale résultant alors de toute obligation par acte notarié ;

Considérant que la dite opposante n'a allégué ni prouvé aucune reconnaissance subséquente par le débiteur de la dite rente, et quelle n'appuie sa réclamation que des titres-nouveaux par des tiers détenteurs des dits trois lots, et entre autres par Pierre Dessaint dit St. Pierre en date du 12 février 1842, dans lequel le dit Pierre Dessaint s'est personnellement obligé au paiement de la dite rente à défaut du débiteur personnel, et un par Jean Baptiste Roy, en date du 20 septembre 1864 ;

Considérant que l'hypothèque, n'étant que l'accessoire d'une

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dette, n'a pas d'existence sans elle, et que partant, l'extinction par la prescription de l'action personnelle éteint par contre-coup l'action hypothécaire, même dans le cas où cette dernière a été conservée par des actes interruptifs ;

Considérant que 58 ans s'étant écoulées depuis la création de l'obligation personnelle du débiteur, elle paraît avoir été, lors de la vente en cette cause de ces dits trois lots, depuis longtemps prescrite et par là-même éteinte, que plus de trente-trois ans s'étant aussi écoulées depuis l'obligation contractée par le dit Pierre Dessaint, au droit duquel sont les défendeurs, et elle était aussi alors prescrite et éteinte, et que la reconnaissance par le dit Jean Baptiste Roy n'a pas pu empêcher l'effet de ces deux prescriptions ;

Considérant que la prescription peut-être opposée par toute personne ayant intérêt à ce qu'elle soit acquise, et qu'elle l'a été à la réclamation de l'opposante par le demandeur ; la contestation par le demandeur de l'opposition de l'opposante est maintenue, et la dite opposition est renvoyée avec dépens.

P. B. Casgrain, pour l'Opposante.

Langlois, Angers, Larue & Angers, pour le Demandeur contestant.

CIRCUIT COURT, ARTHABASKA.

9th JULY 1878.

Coram PLAMONDON, J.

BOUCHARD vs. THIVIERGE.

A condition of the purchase of a lot of land was that the vendor should furnish to the purchaser within one year the Letters Patent from the Crown which constituted the former's title.

HELD:—In an action for payment of the price, that the fulfilment of the said condition was a "precedent obligation" under article 120, C. C. P., and the non-execution of the same was properly pleaded by Dilatory and not by Temporary Exception.

The plaintiff in this cause sold to defendant the South West half of lot No. 4 in the 7th range of the township of Thetford, in the county of Megantic, for the sum of nine hundred dollars, \$100 of which was paid at time of sale, the balance payable in yearly instalments until final payment. By the deed of sale, the vendor obliged himself to deliver to the purchaser the Letters Patent of the said half lot of land, within one year from the date thereof, he having acquired the same from the Crown Lands Department. Defendant being sued for one of the said instalments, pleaded by a dilatory exception that the plaintiff had not fulfilled the obligations incumbent upon him, by the said deed, viz, within one year from its date to deliver to defendant the Patent of the land in question, and asked that all the proceedings in the cause be stayed, until the plaintiff delivered to him the said Patent. To this the plaintiff answered in law: That supposing the facts alleged in the said dilatory exception to be true, they were insufficient in law to maintain the said dilatory exception, and that the said dilatory exception was unfounded in law, because the obligation to furnish Letters Patent of a lot of land, within a delay of one year from the date of the deed of sale, did not constitute *une obligation préjudicielle* to the demand of the plaintiff, which could be the subject of a dilatory exception, and asked for the dismissal of the said plea.

It was also urged by the plaintiff at the hearing that the matter set out by the defendant, should have been pleaded by temporary and not by dilatory exception.

Per curiam.—La seule question est de savoir si le défaut du vendeur de fournir au défendeur les Lettres Patentes, qui lui constituait un droit de propriété, peut être interprété comme l'inexécution d'une obligation préjudicielle suivant les termes de l'article 120, C. P. C.

Il est bien vrai que l'acquéreur, le défendeur, n'a pas été troublé, et de plus qu'il n'y a pas de preuve au dossier qu'il y ait sujet de crainte de trouble. Néanmoins le défendeur n'a pas de titre parfait.

Ce titre le demandeur devait le lui fournir il y a cinq ans, et il n'a allégué aucune raison pour justifier ce retard.

La Cour est d'opinion que l'exception dilatoire est bien fon-

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dée et icelle est maintenue, et il est ordonné en conséquence que tous les procédés dans cette cause soient interrompus et suspendus jusqu'à ce que le demandeur ait fourni et délivré au défendeur les Lettres Patentes de la propriété vendue, avec dépens.

Laurier & Lavergne, for Plaintiff.

T. C. Aylwin, for Defendant.

COUR DE RÉVISION, QUÉBEC.

Coram MEREDITH, C. J., STUART, J., CASAULT, J.

No. 1171.

PARENT v. DAIGLE.

ACTION NÉGATOIRE—DROIT DE PASSAGE—CHEMIN PUBLIC.

Held :—That the road in question, which had been enjoyed as such for thirty years and upwards, by the plaintiff, the defendant, and others requiring to use it, was to be deemed a public road, within the meaning of the 18 Vic. c. 100, sec. 41, sub section 9.

Questions considered :

1st. As to whether the proprietor of a *fonds enclavé* (within the meaning of article 540 of the Civil Code,) who has enjoyed a right of passage over an adjoining property for 30 years and upwards, is liable to be disturbed in his enjoyment, by reason, merely, of his being unable to produce a written title, as the basis of his enjoyment.

2d. Does the maxim " *nulle servitude sans titre*," apply to a case such as the present.

CASAULT, J., (dissentiens) :

Le demandeur est propriétaire d'une terre marquée C sur le plan Z produit par lui. Le défendeur est propriétaire de plusieurs lots de terre distincts et séparés, dont l'un marqué A sur le plan Z, à l'ouest de la terre C du demandeur, et qui en est séparé par une autre terre marquée B, sur le même plan Z.

Le demandeur se plaint par sa déclaration *amendée* de ce que le défendeur qui n'a aucun droit de servitude sur sa terre C en faveur de sa terre A, prétend néanmoins se maintenir dans l'exercice d'une servitude de passage sur la dite terre C en faveur de la dite terre A, et de ce qu'il a, pour cet objet, brisé une clôture du demandeur dans la ligne sud-ouest de sa terre C, et il conclut à ce que son dit "immeuble soit déclaré être et avoir toujours "été franc, quitte et libre de toute servitude quelconque pour "l'utilité du dit immeuble du défendeur, et notamment de la "servitude de passage susdit, et que c'est sans cause et à tort "que le défendeur a prétendu y exercer le dit droit de passage ; "qu'il lui soit fait défense de ne plus à l'avenir entrer en aucune "manière sur le dit immeuble du défendeur pour y exercer "le dit prétendu droit de passage."

Il est important de remarquer que la première déclaration, les plaidoyers du défendeur et les réponses spéciales du demandeur ont été abandonnés, et que de consentement, le demandeur a produit une déclaration *amendée* à laquelle a plaidé le défendeur, et sur laquelle la contestation a été liée, et qu'il ne s'agit que de la demande ou plainte énoncée dans cette déclaration *amendée*.

La première déclaration niait au défendeur tout droit de servitude sur la terre C ; or il en a un que ne lui conteste pas le demandeur, pour une terre dans une autre concession au nord et plus à l'est que celle du demandeur. Cette terre est marquée P sur le plan Z. L'amendement de la déclaration élimine entièrement cette terre de la contestation ; il empêche la confusion et limite clairement à la terre A du défendeur la négation de toute servitude sur la terre C du demandeur.

La servitude existante sur la terre du demandeur C, en faveur de la terre P est un droit de passage sur la terre C, pour communiquer de la terre P dans la concession au nord de la terre du demandeur C, au chemin du roi qui est au sud de cette dernière.

Le défendeur invoque par son exception trois moyens contre l'action du demandeur.

Par le premier il allègue la servitude de passage sur la terre C en faveur de la terre P, et ses titres à cette dernière ainsi qu'à

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la terre A, et il ajoute qu'il n'y a ni grange ni bâtisse sur la terre P, et que depuis plus de 30 ans, et de temps immémorial, la grange et les instruments aratoires servant à l'exploitation de la terre P ont été situés sur la terre A, qu'elles avaient toutes deux pendant tout ce temps appartenu aux mêmes propriétaires, qui avaient toujours exercé la servitude en faveur de la terre P sur la terre C, en descendant de l'extrémité nord de la terre C quelque distance, de là gagnant la terre A, et sur cette dernière et la terre B, entre elle et C, une distance plus considérable, puis revenant (en traversant de nouveau B) sur la terre C, et continuant pour quelque distance sur cette dernière jusqu'au chemin du roi au sud d'icelle ; et que, dans l'occasion dont se plaint le demandeur, le défendeur, avec un cheval et une voiture dont il se servait d'habitude pour l'exploitation de la terre P, était parti de sa maison sur la terre A, et s'était rendu au chemin du roi en passant sur la terre C, et était revenu de même pour une affaire qui concernait la terre P, savoir : pour consulter sur son droit de passage.

Il est sans intérêt que le cheval et la voiture employés par le défendeur dans l'occasion en question fussent ceux qu'il employait généralement pour la culture de la terre P, et que la preuve constate être ceux avec lesquels il exploite ces deux autres terres. Ce ne sont pas eux qui peuvent déterminer si le défendeur exerçait un droit, mais l'emploi auquel ils servaient.

Le défendeur argue que ce mode d'user de la servitude dont la terre C du demandeur est chargée en faveur de sa terre P est moins onéreux que s'il traversait cette dernière dans toute sa longueur, et que l'on peut prescrire le mode d'user d'une servitude. Ces deux propositions ne peuvent pas être contestées pour la terre P. Mais, en changeant ce mode et le prescrivant, on ne peut pas charger le fonds servant d'une autre servitude en faveur d'un autre fonds, et lui imposer par là deux fonds dominants, distincts et entièrement séparés au lieu d'un.

Le défendeur admet et il est prouvé que dans l'occasion mentionnée dans la déclaration, lui, le dit défendeur, partait de sa maison sur la terre A, et qu'il se rendait au village de Beauport consulter sur ses droits à un passage sur la terre C du demandeur, et que pour s'y rendre, il a passé en allant et en revenant sur cette dite terre C. Il est aussi prouvé que, pour

passer, il a, en allant, défait deux pagées de la clôture sud-ouest du demandeur, et pour revenir quatre pagées, et qu'il n'y avait jamais eu de clôture à cet endroit. Que cette consultation fut quant à ses droits de passage pour sa propriété P, ou pour ceux dans lesquels il prétend se maintenir pour sa propriété A, cela ne change pas la question. Il a passé sur la propriété C du demandeur pour sortir de sa terre A et y revenir, c'est-à-dire il a passé sur un fonds non servant pour sortir d'un fonds non dominant et y rentrer, et pour y passer il a défait la clôture du demandeur entre sa terre C et la terre B, appartenant à un tiers. Cette terre A n'avait pas droit de passage ni aucun autre droit de servitude sur la terre C, par conséquent, en ne considérant que le premier moyen invoqué par le défendeur, savoir la servitude en faveur de sa terre P et la prescription de son mode d'usage, il est évident que le demandeur était bien fondé à lui nier le droit de passer pour aller à la terre A, et à prendre une action négatoire pour faire déclarer que le défendeur n'avait pas le droit qu'il assume.

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Le second moyen invoqué par le défendeur est que sa terre A ainsi que la terre B qui la sépare de la terre C du demandeur sont deux enclaves qui ont, de temps immémorial, eu leur sortie au chemin du roi, en passant sur cette terre C du demandeur, et que sa terre a par là-même acquis par prescription un droit de passage sur la terre C du demandeur. La preuve est, spivant moi, loin d'établir que la terre A du défendeur soit une enclave. Et si le défendeur eut, à ce titre, demandé ce passage, le demandeur aurait pu lui répondre (C. C. 541) ce que constate la preuve, savoir : qu'il peut en sortir par chez son voisin au sud-ouest sans traverser la terre de leur voisin commun pour venir sortir sur celle du demandeur.

Mais en supposant qu'elle soit une enclave, ce fait et celui admis par les parties que, de temps immémorial, les propriétaires de la terre A ont communiqué au chemin du roi en passant sur la terre C du demandeur, à l'endroit même où le défendeur y a passé le jour spécialement mentionné dans la déclaration, confère-t-il en faveur de la terre A une servitude ou droit de passage sur la terre C du demandeur ?

Pour soutenir l'affirmative, le défendeur fait de nombreux extraits des commentateurs du code français, et entre autres

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Teulet, d'Auvilliers et Sulpice p. 189 par. 16, ou ils disent :
 " Comme toute servitude légale, le droit de passage en cas d'en-
 " clave est prescriptible, et peut conséquemment s'acquérir sans
 " titre." La doctrine exprimée par ces auteurs est celle unanime
 de tous les commentateurs du code français et elle ne fait
 qu'énoncer une règle qu'y a consacrée la jurisprudence. Mais
 en étudiant les commentateurs du code français, on verra que
 leur opinion a pour appui, en premier lieu, une disposition (celle
 de l'article 685 du Code Napoléon qui n'a pas de correspondant
 ni dans notre code, ni dans le droit pré-existant), qui fait pres-
 criptible l'action en indemnité, tout en continuant le droit de
 passage qu'exerce la propriété enclavée,—et en second lieu, une
 autre disposition du code français reproduite par le nôtre (art.
 540 et seq.) qui fait légale la servitude du droit de passage par
 l'enclavé.

L'article 68 du code français est en ces termes : " L'action
 " en indemnité dans le cas prévu par l'article 68 est prescrip-
 " tible, et le passage doit être continué, quoique l'action en
 " indemnité ne soit plus recevable."

12 Demolombe No. 635 p. 121 : " 1° Du texte de l'article 685
 " il résulte que c'est le propriétaire du fonds sur lequel le
 " passage est exercé, qui a une action en indemnité, c'est-à-dire
 " que c'est lui qui doit se constituer demandeur à cet effet ;
 " tandis que le propriétaire du fonds enclavé n'a rien à réclamer
 " et qu'il est, par la loi elle-même, autorisé à passer sur le
 " fonds voisin, par cela seul que le sien est enclavé. Voilà bien
 " évidemment ce que suppose l'article 685, puisqu'il ajoute que
 " le passage doit être continué, quoique l'action en indemnité
 " ne soit plus recevable. Les rôles sont donc tout à fait inter-
 " vertis ; et notre article 685 consacre le système, que déjà l'ar-
 " ticle 643 avait établi, en décidant que lorsque les eaux d'une
 " source sont nécessaires aux habitants d'une commune, et qu'ils
 " en ont usé pendant trente ans, par suite de cette nécessité, le
 " propriétaire ne peut plus réclamer une indemnité (supra No. 98.)
 " 2° Le principe nouveau est donc que la servitude légale de
 " passage est due de plein droit, dès qu'il y a enclave, indépen-
 " damment de toute réclamation ; ou, si l'on veut, que le fait
 " même de l'exercice du passage par le propriétaire enclavé,
 " équivalant virtuellement à cette réclamation, et met dès lors le
 " propriétaire du fonds voisin en demeure de réclamer une in-

“ demnité; s'il croit qu'il y soit fondé. Ce que l'article 685
 “ décrète, c'est donc une prescription, non pas acquisitive, mais
 “ purement extinctive et libératoire; et la vérité est que si on
 “ ne l'appliquait qu'à l'hypothèse où l'indemnité aurait été réglée,
 “ il n'ajouterait absolument rien à l'article 682, et qu'il serait,
 “ dans notre chapitre une disposition tout a fait inutile.”

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Les codificateurs de notre code, dans leur rapport p. 400 sur la section du titre des servitudes qui traite du droit de passage, s'expriment comme suit : “ Quant à l'article 685 du Code Napoléon, qui déclare prescriptible l'indemnité payable pour le prix ou la valeur du passage, il est omis comme inutile, l'action pour cette indemnité ne présentant rien de particulier qui l'empêche d'être soumise aux règles générales sur la prescription. Cet article pourrait être nécessaire dans le système du code, qui admet l'acquisition des servitudes par prescription, mais ne l'est pas dans le nôtre où le principe déjà posé et admis est *nulle servitude sans titre*.”

On le voit, c'est cet article 685 du code français qui a fait admettre en France la prescription du droit de passage par l'enclavé. Sans lui, dit Demolombe, quelques lignes plus haut et avec l'article 682 seul, dont le nôtre 540 est la copie, il faudrait pour que l'enclavé pût prescrire l'indemnité, que le passage eût été accordé ou obtenu, et que le titré le donnant eût déterminé le montant de l'indemnité. Voici ce que dit le même auteur p. 118, No. 634, où il parle du droit avant le code qui avait consacré l'axiôme “ *nulle servitude sans titre* ” que notre code a reproduit à l'article 549, comme suit : “ Nulle servitude ne peut s'établir sans titre : la possession même immémoriale ne suffit pas à cet effet.”

“ Dans notre ancien droit, cette question (celle de la prescription de l'indemnité sans règlement préalable conventionnel ou judiciaire) aurait dû être résolue négativement, sous l'empire des coutumes de Paris (article 186), de Normandie (article 607) et de bien d'autres encore, qui avaient admis la maxime : “ *nulle servitude sans titre*, et qui ne consacraient pas, d'ailleurs, par une disposition spéciale, la servitude légale de passage en cas d'enclave.”

“ On a objecté, il est vrai, dans l'opinion contraire, que dès avant même le Code Napoléon, la jurisprudence et l'usage

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“ autorisaient le propriétaire enclavé à exiger un passage sur l'un des fonds voisins. (Il cite ici de nombreux arrêts et commentateurs). Mais précisément cette objection prouve qu'il n'existait point alors de loi spéciale, qui établît de plein droit cette servitude, et qu'elle n'était sous aucun rapport, fondée sur un titre ; la jurisprudence permettait bien au propriétaire enclavé de s'adresser à la justice pour obtenir un passage ; et alors, la décision judiciaire devenait le titre constitutif de la servitude ; mais jusque là, il n'en existait aucun ; et voilà pourquoi Basnage écrivait que cette question n'est pas malaisée en Normandie, où les servitudes ne se peuvent acquérir sans titre ; car toutefois et quantes que la constitution de servitude ne paraît point, ou qu'elle n'est pas fondée sur la loi ou sur la coutume, il est vrai de dire que l'on n'a passé par le lieu contentieux “ que par la souffrance et la civilité du propriétaire.”

Ce que dit ici Demolombe pour les Coutumes qui n'admettaient pas de servitudes sans titre, est consacré par tous les arrêts des Cours Souveraines et de la Cour de Cassation en France.

1°. Jugé en première instance, le 26 décembre 1810, que sous l'empire de la Coutume de Paris, l'enclavé ne pouvait pas acquérir le droit de passage par prescription. Confirmé en appel par la cour royale de Poitiers le 10 juin 1812, parceque le droit de passage n'était pas une propriété absolue ; mais le droit d'user de la propriété d'autrui, c'est-à-dire, une servitude sur cette dernière, et que l'article 186 de la Coutume de Paris dit que “ *droit de servitude ne s'acquiert par longue jouissance, quelque elle soit, sans titre, encore que l'on avait joui pendant cent ans.* ” Confirmé par la cour de cassation le 7 février 1813.

2°. 25 juin 1825, 25 Journal du Palais, p. 623, arrêt de la cour royale de Poitiers, décidant la même chose, et où l'on trouve le considérant suivant : “ Considérant que l'article 685 Code Civil, “ étant introductif d'un droit nouveau pour tous les pays régis “ par l'article 186 de la coutume de Paris, les faits de possession “ dans l'espèce ne peuvent être d'aucun effet, puisqu'il s'agit “ d'une servitude de passage qui ne peut être établie que par “ titre.”

3°. Jugé par le tribunal de Sables-d'Olonne, 14 juillet 1828,

que la prescription du passage par l'enclavé pouvait s'acquérir par prescription,—infirmé par la Cour royale de Poitiers le 21 novembre 1828. Deux des considérants sont : “ qu'aux termes “ de l'article 186 de la coutume de Paris, il ne pouvait exister “ de servitude sans-titre, et que cet article avait force de loi “ dans le ressort de l'ancienne Coutume de Poitou, et y était “ observé littéralement et d'une manière absolue, et qu'en l'absence de tout acte ou convention écrite, le passage, même au “ cas d'enclave, et pendant quelque temps qu'il ait été exercé, “ n'était considéré que comme un passage de tolérance, susceptible d'être supprimé à la première volonté de celui qui l'avait “ toléré..... que si le code civil (article 685) a introduit un “ droit nouveau, il ne peut avoir d'effet rétroactif, et que moins “ de 30 ans se sont écoulées depuis sa promulgation, etc.”

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Cet arrêt a été confirmé en Cassation le 11 mai 1830. Sirey, 1828, 1830, 1, 516.

Une note dans Sirey dit : “ La doctrine et la jurisprudence “ sont aujourd'hui fixées en ce sens que, même dans les coutumes qui n'admettaient pas de servitudes sans titres, le passage “ en cas d'enclave, ou plutôt l'indemnité représentative de ce “ passage, pouvait être l'objet de la prescription trentenaire. “ V. Cass. 10 juillet 1821 et les notes.”

Le Juge en Chef ayant attiré mon attention à cette note, j'ai référé à la décision de la cour de Cassation qui est rapportée par Sirey 1819-1821, 1, 465. Le tribunal de Tarbes avait refusé d'admettre la preuve que l'enclavé voulait faire de sa possession du droit de passage pendant plus de 40 ans, “ parcequ'il n'offrait “ pas de prouver qu'il avait été en possession du passage sur le “ fonds voisin *au vu et au su* du propriétaire, ainsi que le voulait, “ y était-il dit, la jurisprudence du parlement de Toulouse.” La cour royale de Pau, sur appel, avait confirmé cette décision. La cour de cassation a cassé l'arrêt sur les motifs : “ Que cette espèce de servitude, quoique discontinue, *a toujours pu, ainsi que “ le reconnaît l'arrêt attaqué, s'acquérir par la possession,* que la durée “ et les conditions de la possession requises pour acquérir la “ prescription n'étaient pas réglées par les lois anciennes, et “ qu'ainsi il fallait sur ce point référer aux dispositions des “ articles 690 et 2262 du code civil, qui fixent à 30 ans la durée “ de cette possession, etc.”

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Il était constaté que, dans ce ressort du Parlement de Toulouse où étaient situés les fonds qui donnaient lieu au procès, l'enclavé pouvait acquérir le passage par prescription, tel que le constataient des arrêts de ce Parlement du 21 mai 1723, 5 avril 1771 et 30 janvier 1772, jurisprudence qu'avait depuis confirmée la Cour royale. Il était aussi constaté que la servitude de passage non nécessaire pouvait y être acquise par une possession immémoriale, et on citait même un arrêt du même Parlement, du 14 mai 1663, qui avait jugé qu'une servitude de passage non nécessaire pouvait s'acquérir par la prescription trentenaire pourvu qu'il fut établi qu'elle eût été exercée *au vû et sù* du propriétaire. C'était l'absence de cette preuve du *vû et sù* que le tribunal de Tarbes et la Cour royale de Paris avait déclarée fatale aux prétentions de l'enclavé ; et rien de plus. La cour de Cassation a déclaré qu'en l'absence de règles positives établies et reconnues par la jurisprudence dans le ressort du Parlement de Toulouse, le code civil déterminait quelle devait être la durée et les conditions de la possession, et cassé l'arrêt qui exigeait la preuve d'une possession au *vû et sù* du propriétaire du fonds servant.

On voit par là même que cet arrêt est loin de justifier ce qu'affirme Sirey dans la note citée. Il ne s'agissait pas d'un passage sous une Coutume qui n'admettait pas les servitudes sans titre, mais de l'espèce de possession requise pour le prescrire dans un territoire où la loi admettait son acquisition par prescription, sans déterminer la durée et les conditions de la possession requise.

4° 1837, juin 27, Sirey 32, 1, 763. Le tribunal d'Alençon ayant permis la preuve d'une possession trentenaire d'un droit de passage par un enclavé, la Cour de Caen a réformé cette décision par arrêt du 4 mai 1831 pour entre autre considérants les suivants : " Considérant qu'on ne doit pas prononcer sur le droit de passage réclamé, d'après les dispositions du code civil, mais suivant les lois antérieures ; que l'article 607 de la Coutume de Normandie n'admettait pas de servitudes sans titre ; que le propriétaire du fonds enclavé et qui n'avait pas de titre pour constater sur quelle propriété, de quelle manière et à quelle condition il pouvait passer, devait, lorsqu'on lui refusait le passage, le faire régler par le juge dont la sentence devenait son titre ; que le principe admis en Normandie, qu'il n'y avait pas de

“ servitude sans titre, ne recevait dès lors pas d'exception pour le cas d'enclave, et qu'on ne pouvait acquérir le droit de passage par prescription, une longue possession étant toujours considérée comme une suite d'actes de simple tolérance.”.....

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Cet arrêt a, le 27 juin 1832, été maintenu par la Cour de Cassation dont les motifs méritent d'être répétés ; “ Considérant que, dans l'espèce, il ne s'agissait pas de l'application de l'article 685, code civil ; que la question était régie par les principes de la coutume de Normandie ;.....

“ Considérant qu'aux termes de l'article 607, coutume de Normandie, aucune servitude ne pouvait s'acquérir sans titre ; qu'il n'existait pas de loi spéciale dans cette province sur l'acquisition du droit de passage en cas d'enclave ; que l'arrêt déclare, en fait, que d'après le principe constant admis en Normandie, le propriétaire d'un fonds enclavé pouvait exiger un passage sur l'un des fonds voisins ; il déclare aussi que, s'il ne l'avait pas exigé en justice ou obtenu par titre, l'usage par lui fait du passage était réputé précaire et de tolérance, ne créait pas un droit ni ne fondait pas la prescription de l'indemnité, à la différence du principe établi par le code civil ;—Considérant que les lois n'ayant pas d'effet rétroactif, la cour de Caen a pu, sans violer l'article 685, code civil, l'appliquer (art. 607, coutume de Normandie) à un état de choses antérieur à la promulgation de ce code ;—

5°. 1835 juillet 22, Sirey 85, 2, 495, arrêt de la Cour d'Orléans en ces termes. “ Considérant que l'article 225 de la coutume d'Orléans, qui régissait les lieux, n'admettait aucune servitude sans titre ; que cette disposition était absolue et ne recevait aucune exception, même pour le cas d'enclave ;—Que si l'article 685, code civil, introduit un droit nouveau, il n'est pas applicable dans l'espèce, puisqu'il ne s'est pas écoulé trente ans depuis la promulgation du titre des servitudes jusqu'au jour de la demande ;—Confirme, etc.”

Sirey fait précéder cette dernière citation d'un préambule où il cite un arrêt de la Cour de Cassation du 16 février 1835, qui, dit-il, a décidé d'après les dispositions du code civil que la servitude, en cas d'enclave, pouvait être acquise par prescription ; il ajoute que la question a été diversement jugée par la cour

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de Cassation même, et il cite à l'appui de cette assertion Jurisprudence du XIX siècle, vbo enclave § 2. L'arrêt du 16 février 1835 est rapporté par Sirey lui-même 35, 1, 108. On y voit que le jugement originaire a été rendu par le tribunal de Gaillac qui avait décidé, le 25 février 1828, que l'enclavé avait acquis le droit de passage par prescription ; que la Cour royale de Toulouse avait, sur appel, été d'avis qu'il n'y avait pas enclave et infirmé le premier jugement ; que la cour de Cassation a décidé qu'il y avait enclave et maintenu l'enclavé dans le droit de passage dont il avait établi avoir joui, *au vu et su* du propriétaire du fond servant, pendant plus de 30 ans. Ni le jugement du tribunal de Gaillac ni les arrêts en appel et en cassation ne disent la situation des fonds en question ; mais il est facile de voir qu'ils étaient dans le ressort de l'ancien Parlement de Toulouse, car la matière étant réelle, elle devait, aux termes du Code de Procédure Française article 59, être soumise au tribunal de la situation des fonds, et Gaillac est dans l'ancien Languedoc, c'est-à-dire dans la juridiction du parlement de Toulouse où la jurisprudence autorisait la prescription du droit de passage.

L'arrêt de la Cour de Cassation ne cite que les articles du code civil, et c'est probablement ce qui a induit Sirey en erreur. Mais cette Cour avait déjà décidé le 10 juillet 1821, par l'arrêt que j'ai cité plus haut, que la jurisprudence du parlement de Toulouse permettait l'acquisition du droit de passage par prescription ; mais que cette jurisprudence ne déterminant ni l'espèce ni la durée de la possession requise, la qualité de la possession et sa durée devaient être celles requises par le code civil. Il n'était pas nécessaire d'ajouter de nouveau ce considérant dans une cause où, ni les parties, ni les tribunaux en première instance et en appel n'avaient revoqué en doute que l'enclavé, dans le cas soumis, pouvait acquérir le passage par prescription, et où la seule contestation et toute la divergence étaient quant à l'existence de l'enclave. Sauf la répétition d'un motif qui, sous les circonstances, eût été, il faut l'avouer, un hors-d'œuvre, l'arrêt du 16 février 1835 n'est que la reproduction des principes qui ont motivé celui du 10 juillet 1821.

Il m'a été impossible de trouver dans la jurisprudence du XIX siècle, à l'endroit cité par Sirey, un seul arrêt qui ait maintenu que le droit de passage pouvait être acquis par prescrip-

tion sous les Coutumes où les servitudes ne pouvaient pas exister sans titre.

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En supposant donc que la propriété A du défendeur soit une enclave, il n'a pu à ce titre obtenir le droit de passage sur la terre C du demandeur par l'usage qu'il en fait, quelque long et immémorial qu'ait été cet usage. Il lui faut, pour cette servitude, produire un titre sans lequel il ne peut pas s'y maintenir, et ne peut pas par là même demander le renvoi de l'action du demandeur qui conclut à le faire déclarer sans droit sous ce rapport.

Le troisième moyen du défendeur est que le chemin en question est un chemin public, et il cite, pour le démontrer, l'acte 18 Vict. chap. 100, s. 41, s. s. 9, qui est en ces termes : " Any road left open to and used as such by the public without contestation of their right during a period of 10 years and upwards, shall be held to have been legally declared a public highway by some competent authority as aforesaid, and to be a road within the meaning of this Act." Mais en référant aux allégations de son exception sous ce rapport, on verra s'il est possible de faire l'application de la loi citée à l'état de chose qu'il énonce. Voici ce qu'il plaide : " Que de plus le dit chemin de charrette sur le dit fonds servant, est et a toujours été, depuis au-delà de 30 ans et de temps immémorial, un chemin public et reconnu tel et servant comme tel, a toujours servi comme tel, et comme étant le seul débouché des immeubles situés au nord du dit fonds servant et de ses voisins à l'est et à l'ouest, et touchant le trait quarré qui termine le dit fonds servant et ses dits voisins au nord, et servant comme tel à plusieurs immeubles situés au nord du dit trait quarré, savoir entre autres les terres de François Parent, Thomas Parent et du défendeur." On conçoit difficilement qu'un *chemin de charrette* sur un *fonds servant* puisse être un chemin public, dont l'exercice ne peut être limité à des voitures d'une espèce particulière, et qui n'admet pas de fonds servant puisque le fonds ou terrain du chemin public est la propriété de la municipalité. Les termes employés par le défendeur lui-même démontrent l'impossibilité de ce moyen de défense, et suffiraient seuls pour le faire rejeter.

Le témoin du défendeur, François Parent, p. 9 verso, dit que cinq personnes se servaient de ce chemin de charrette comme

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l'appelle le défendeur. L'allégation du défendeur dans ses défenses, jointe à la preuve, ne permettent certainement pas de déclarer que ce chemin est public et qu'on peut y appliquer les dispositions de l'acte 18 Vict. chap. 100 s. 41, s. s. 9, qui suppose un chemin *ouvert au public* et non un dont on a souffert l'usage par trois propriétaires voisins, ou, comme l'appelle le défendeur lui-même, *un chemin de charrette sur un fonds servant* ; mais, dit-on, tous ceux qui avaient affaire à ces trois propriétaires y passaient ; il était par là même public. La réponse est que les étrangers qui y passaient pour se rendre chez ces trois propriétaires n'exerçaient pas un droit qui leur était propre ; mais usaient de la tolérance accordée à ceux chez qui ils se rendaient.

Le défendeur, dans son factum, dit que ce chemin est la communication entre celui de Beauport et celui du *trait quarré*. Il m'a été impossible de trouver, dans la preuve, qu'il y eût dans le trait quarré le chemin qu'il y indique sur son plan. Et y en eût-il un, il eût dû prouver quand il a été ouvert, afin de montrer (ce qu'il affirme) que celui en question était la communication entre ces deux chemins depuis le nombre d'années requis pour le prescrire, et en faire une propriété publique.

Le jugement me paraît être insoutenable. Il prononce virtuellement que la servitude créée sur la terre C en faveur de la terre P, donne au défendeur le droit d'un passage sur la terre C du demandeur, pour communiquer de la terre A du défendeur au chemin du roi ; maintient les prétentions du défendeur sous ce rapport, et renvoie l'action que les défenses mêmes du défendeur aurait justifiée, si ses prétentions ne l'eussent pas fait auparavant. Ce que le défendeur y soutient, c'est que sa propriété A a un droit de passage sur la propriété C du demandeur. C'est à ce titre qu'il demande le renvoi de l'action du demandeur, et c'est ce que le jugement lui accorde.

Le demandeur, après avoir aussi longtemps permis au défendeur de passer sur sa terre, n'aurait pas dû l'arrêter et fermer le passage sans avis préalable.

Ce moyen qu'il a pris d'affirmer ses droits, fait supposer de la malice, et cette circonstance a pu influencer sur le jugement en première instance.

Si au lieu de plaider qu'il avait acquis un droit de passage

pour sa terre A parceque le chemin de charrette était chemin public, parceque cette terre A était une enclave, et que comme telle, elle avait prescrit le droit de passage en question par le long usage, le défendeur se fût porté demandeur incident et eût par sa demande incidente conclu, vû son enclave, à être maintenu dans ce droit de passage moyennant indemnité, il eut dû suivant moi l'obtenir, et vû sa longue jouissance, sans frais, probablement même sans une indemnité autre que nominale. Mais le demandeur se plaint que le défendeur exerce sans droit une servitude au profit du fonds A sur sa terre C. Le défendeur soutient que cette servitude existe, et parceque sa terre est une enclave, et qu'il a prescrit le droit de sortie sur cette terre C, et parceque le chemin où il a passé est un chemin public. Je ne crois pas que ses prétentions soient fondées, et le jugement, suivant moi, devrait être infirmé et l'action qu'il a renvoyée, maintenue.

MEREDITH, C. J. This is an *action négatoire*.

The defendant, as the owner of a farm marked P, on the plan Z, has a right to pass over the road shown by a dotted line, on the said plan.

The defendant does not live on the farm P ; but on the farm A also shown on same plan. And the contention of the plaintiff is, that the defendant uses the said road, not only for the farm P, in favor of which there is a servitude, but also on the farm A, in favor of which there is no servitude. And there can be no doubt that the deed of 1779, by which the servitude respecting the road in question was created, established the servitude in favor of the farm P, and not in favor of the farm A.

About the first of May last the plaintiff attempted to stop up the road in question, by putting a fence across it, which fence the defendant took down, and hence the present action which complains of the pulling down of the said fence ; and puts in issue the right of the defendant to use the said road for the purposes of the farm A.

It is clearly established, and is not I believe denied, that the plaintiff put up the fence at a place where the defendant,

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for the purposes of the farm P, had a right to pass, and where the defendant and his predecessors always had passed.

Pierre Parent, the plaintiff's first witness, and his son, says "Ainsi quand le défendeur est ainsi passé à l'époque susdite, il passait exactement au même endroit où il avait toujours passé auparavant."

François Parent, the plaintiff's second witness, and his son, who had the chief management of this case, says "Le défendeur a toujours passé par ce même chemin, avant que nous ayons mis une clôture, traversant le dit chemin; il n'y avait jamais eu de clôture pour traverser le dit chemin." And in another part of his deposition, speaking of the same road, he says it is "le seul chemin qui sert *de temps immémorial* à toutes ces terres et aux terres du trait-quarré en haut."

The plaintiff was plainly wrong in putting up, without any notice, a fence on a road over which the defendant had a right to pass, for the purposes of the farm P, and I think that the defendant had a right to take down, as he did, the fence so put up by the plaintiff.

It is however equally certain that the defendant has used the road for the purposes of the farm A, and that, as already mentioned, the servitude created by the deed of 1779 did not extend to the last mentioned farm. On the part of the defendant it is contended that the road in question is a public road, and that it has been used as such for thirty years and upwards; and as tending to support this contention the defendant refers to the 18th Vic. C. 100, sec. 41, sub-sec. 9, declaring "And any road left open to, and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a public highway by some competent authority as aforesaid, and to be a road within the meaning of this Act."

In considering this part of the case it is necessary to bear in mind that the private road intended to be established by the deed of the 19th March 1779, from Simon Parent to Alex Toupin, ought to run exclusively on the farm of the plaintiff marked C, on the plaintiff's plan Z, whereas the road now existing, and in relation to which the present action has been brought, after

entering from the trait-quarré, upon the northerly part of the plaintiff's land, passes to the land of Thomas Parent, and also to the land of Octave Parent, thence to the land of the defendant; from that to the land of the widow George Parent, from which it returns to the land of the plaintiff, and, after passing over it, terminates on the Beauport High road.

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This road, as thus situated, has been used as a Public Road for thirty years and upwards, and in fact for time immemorial, by all the parties above named, and their predecessors, and by all others who had occasion to use it, or who thought fit to do so.

François Parent the son of the plaintiff, and who, (his father being unwell,) has had the management of the present suit, says: "Le chemin que j'ai décrit sur le dit croquis, est le seul chemin qui sert de temps immémorial, à toutes ces terres, et aux terres du trait-quarré en haut."

Paul Parent, a cousin of the plaintiff, a merchant, says: "Cette route en question, servait pour tout le canton, pour tout le monde; et tous ceux qui y avaient affaire, tous ceux qui voulaient y passaient, et personne ne les en empêchait. C'était une route publique; et c'en a toujours été ainsi depuis que j'ai connaissance."

Thomas Parent, also a cousin of the plaintiff, says: "La route de charrette en cette cause, est une route qui sert à tout le monde qui veut y passer; et cela en a toujours été ainsi, à ma connaissance." And lower down in his evidence, the same witness says: "L'hiver le chemin était toujours battu. Ce chemin a toujours été le seul chemin de communication entre le chemin du trait-quarré, et le chemin du Roi." And Charles Parent a brother of the plaintiff aged 75, says speaking of the road in question. "Il sert au canton, et ceux qui ont affaire a y venir. Il a toujours servi ainsi depuis que j'ai connaissance."

It is true that these witnesses say that the persons, who habitually used this road, were the persons in the immediate vicinity, and their friends; and, as we know, the road as established, was originally a private road for the use of a single farm. But a private road may, under the statute already

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cited, become a public road; and the fact that it is not used by those who do not require it, is what occurs with respect to every road, and is of no importance. What is of importance is that it be generally and constantly used as a public road by those who do require it, and after giving to this part of the case the best consideration in my power, I agree with my brother STUART in thinking that this was done, with respect to the road in question; and that according to the evidence, and under the provisions of the statute already referred to, the road in question has become, and now is a public road.

I feel the less hesitation in arriving at this conclusion, because I can see no sufficient reason for setting aside an arrangement towards which the plaintiff, the defendant, and several of their neighbours have contributed land; and which has been publicly acquiesced in, time immemorial, by the plaintiff, the defendant, their neighbours and all others interested.

The plaintiff, it is to be recollected, does not contend that he can cause that road to be closed, for if it be not a public road, it is a private road established for the use of the defendant's farm P, and I cannot see that the plaintiff has any appreciable interest in preventing the defendant from passing on the road for the purposes of his farm A, as he and predecessors have done time immemorial.

Agreeing as I do with my brother STUART in the opinion that the road in question ought now to be deemed a public road within the meaning of the 18th Vic. c. 100, sec. 41, sub-sec. 9, we might avoid the consideration of the second contention advanced by the defendant, but as it presents an interesting legal question, fully discussed in the arguments and factums of the parties, and in the very able judgment which has been just read by my brother CASAULT, I think it may be well to state the grounds, which prevent me, as at present advised, from concurring in the conclusions arrived at by that learned judge.

What the defendant secondly contends is that his land A is now and always has been enclosed *enclavé* on all sides by that of others, and has no communication with the main or front road, except by passing on the road in question, and further that the defendant and his predecessors had a right by law to

claim a way or passage on the land of the plaintiff, and that, under that right, the defendant and his predecessors, from time immemorial, have used the said road for the purposes of the farm A.

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3dly. That the enjoyment by the defendant and his predecessors, as owners of the said property A, so *enclavé*, of the said passage, for thirty years and upwards, under the right so conferred upon them by law, has defined and perfected the defendant's right to enjoy the said passage, and has rendered it indefeasible.

As to the question of the alleged *enclave* it cannot be said, literally speaking, that the land A is enclosed on all sides by that of others. On the contrary to the South it adjoins the high road. But there is on the front of the land, a sharp bank *butte*, beyond which there is a kind of bog, or swamp *mollière*.

The defendant's house is still farther back, according to the plaintiff's plan Z, more than three acres from the road, and it may reasonably be presumed that it has been placed where it is, at a very unusual distance from the high road, in consequence of the existence of the said *butte et mollière*; through which no road has ever yet been made.

The authorities cited by the learned counsel for the defendant are very applicable to the case before us

Feulet d'Auvilliers and Sulpice, page 188, par. 4, with reference to the article 682 of the Code Napoleon, which is the same as the article 540 of our Code, say "La question de savoir si un fonds est enclavé, est une question de fait qui est d'ailleurs abandonnée à l'entière discrétion du juge. Ainsi un fonds pourra être considéré comme enclavé, bien qu'il ait une sortie directe sur la voie publique, si cette sortie est difficile, impraticable ou présente des dangers sérieux, auxquels il ne serait possible de remédier qu'avec grandes dépenses."

And Dalloz Rec. Jur. 1852, part 1, p. 164, reports an arrêt by which it was decided that "Un terrain bordant la voie publique est réputé en état d'enclavé dans le sens de l'article 682, C. N., lorsque sa pente sur cette voie, 17 centimètres par mètre, exclut la possibilité d'y aboutir par un chemin prati-

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"cable et que d'ailleurs l'établissement de ce chemin occasionnerait une dépense excessive relativement à la valeur de l'immeuble à desservir."

As to the cost of the road, from the defendant's building to the high road; four of the witnesses say it would cost about \$200, but the witnesses for the plaintiff say it would cost considerably less.

As to the value of the defendant's property B it appears to consist of about three arpents of land, including the bank, *butte*, and bog *mollière* already spoken of. The value of the land and buildings is not I believe proved, but as that land is used for agricultural purposes there cannot I think be any doubt, that the making of a road over the said bank, and through the said bog would bear a very considerable proportion to the value of the whole of the defendant's property.

In considering the evidence and authorities bearing upon this part of the case, it is also to be recollected that even if the road in question is not to be considered a public road, the defendant does not want to deprive the plaintiff of one foot of land for the purpose of securing to himself the passage in question. All that the defendant wants to do, is to be allowed to continue to pass upon a road, upon which he and his neighbours and their predecessors have passed for time immemorial, and which was originally established, (and if not a public road) must continue to exist under the deed made in 1779 to which the predecessors of the defendant, and of the plaintiff were parties. In the arret already cited from Dalloz it is said that property is to be considered *enclavé*, when the establishment of a road upon it "occasionnerait une dépense excessive relativement à la valeur de l'immeuble à desservir." Demolombe, also, says that a property is to be considered *enclavé* when in order to make a road upon it, "il faudrait des dépenses extrêmes et hors de proportion avec le dommage que résulterait pour le propriétaire voisin du passage réclamé sur son fonds, et de l'indemnité qu'il serait nécessaire de lui payer."

Demolombe, Servitudes, vol. 2 p. 91, No. 609.

Bearing in mind that the exercise of the right for which the defendant contends does not subject the plaintiff to any injury

whatever, and that the cost in making a road over the bank and bog on the land of the defendant, would subject him to expenses, out of proportion to the value of his land, it seems to me, as well upon the reason of the thing, as according to the authorities, that the defendant's land ought to be considered *enclavé* within the meaning of article 540.

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Viewing, as I am now doing, the road in question as a private road, we have next to consider whether the fact of the defendant's land being so *enclavé* exempts him from the operation of the general rule: "*Droit de servitude ne s'acquiert par longue jouissance, quelle qu'elle soit, sans titre.*"

Speaking of the servitude in favor of land *enclavé*, Pardessus says: "La servitude dont nous traitons ici (du passage sur le fonds d'autrui,) étant *légale*, n'a besoin d'être *justifiée par aucun titre*. Elle est fondée sur la loi qui l'accorde à la nécessité; elle est justifiée par le fait même de cette nécessité: et faut dès-lors bien se garder de confondre le passage fondé sur la nécessité, qui a une cause légale, avec le passage que ne justifie point une nécessité absolue, et qui ne peut avoir lieu que comme servitude conventionnelle.

"Lors donc qu'il s'élève entre deux propriétaires une contestation relative à un passage, on doit avant tout, considérer si celui qui prétend en user a quelque moyen de se rendre à son fond, indépendamment du passage contesté. S'il en est ainsi, la nécessité n'existe point; il doit rapporter un titre de cette servitude, parceque nous verrons dans la troisième partie qu'elle n'est pas du nombre de celles qui s'acquièrent par prescription.

"S'il prétend, au contraire, et prouve qu'il n'a pas d'autre voie pour arriver à sa propriété que le passage contentieux, la contestation doit être jugée conformément aux principes de la servitude légale de passage; toute la question se réduit à savoir s'il faut un passage, si la nécessité en est établie; et ce point de fait reconnu, le voisin ne peut le contester." (1)

(1) Pardessus Traité des servitudes No. 222 p. 400. Pocquet, coutume d'Anjou, art. 449 ob 2. Poullain Duparc, coutume de Bretagne, Tome 2, p. 379.

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The same doctrine is to be found in Domolombe. "La vérité est que la servitude ici est tout acquise, puisqu'elle est *légale*, c'est-à-dire que le titre du propriétaire enclavé est dans la loi, qui l'établit de plein droit pour lui, dès qu'il y a nécessité, sauf seulement le règlement et la détermination, auxquels il peut y avoir lieu en fait; or, au bout de trente ans la présomption légale est que cette détermination a été faite d'après la disposition des héritages et les convenances locales." (1).

Marcadé also says "Les auteurs et les arrêts s'accordent aussi pour reconnaître, entre la servitude de passage ordinaire et celle de passage pour enclave, une différence qu'il est important de signaler. D'après les articles 688 et 691, la servitude ordinaire de passage se trouve insusceptible de prescription, insusceptible dès lors de possession civile; et tout le monde admet, au contraire, à l'exception seulement de M. Vazeille, que dans le cas d'enclave la servitude de passage demeure susceptible de possession et de prescription."

Lalaure says "Le passage nécessaire d'un fonds enclavé sur les fonds environnants est une espèce de servitude qui, quoique discontinue, *a toujours pu* et peut s'acquérir par la possession. Cette possession est fixée à trente ans, aux termes des articles 390, 2262 et 2281. Les tribunaux doivent admettre la preuve de la possession de cette servitude, et ils ne peuvent débouter de la demande en maintenue, sous le prétexte qu'on n'a pas offert de preuves qu'il y avait possession au vu et au su du propriétaire. Cassat. 10 juillet 1821; D. 1821, p. 213. Voy. cependant Nîmes 24 déc. 1812; P. t. 1, de 1814, p. 523, Lalaure (on art. 682) p. 811, Traité des servitudes."

The opinions above quoted are given with reference mainly to the article 682 of the Code Napoleon, of which our article 540 is a transcript. The last mentioned article has not been given to us as new law. It purports, on the face of it, to be old law; and the commissioners in their report with reference to that article and the two following say: "The three first articles of this section, imitated from the Code Napoleon, articles 682,

" 683, 684, are conformable to the Roman law, *to the old jurisprudence, and to our own*. The rules they express are clear and " precise and require no particular explanations."

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If the old jurisprudence of France, applicable to this country and our own, be as the learned commissioners say, in accordance with article 682, of the french code, then we may safely rely upon the opinions of the commentators upon that article; and according to those opinions, the enjoyment by the defendant and his predecessors, as owners of the property *A enclavé*, of the said passage for thirty years and upwards, ought to be regarded as having defined and perfected the right of the said defendant to the said passage.

It must however be admitted that the opinion of our commissioners to the effect that the article 682 of the Code Napoleon is conformable to the old jurisprudence of France, is contrary to that of Demolombe and others, in so far at least as regards those portions of France which held the maxim, *nulle servitude sans titre*. Demolombe says "La jurisprudence permettait au propriétaire enclavé de s'adresser à la justice pour obtenir un passage, et alors la décision judiciaire devenait le titre constitutif de la servitude; mais jusque là, il n'en existait aucun; et voilà pourquoi Basnage écrivait que cette question n'est pas malaisée en Normandie, où les servitudes ne se peuvent acquérir sans titre; car toutefois et quantes la constitution de servitude ne paraît point, *ou qu'elle n'est pas fondée sur la loi ou sur la coutume*, il est vrai de dire que l'on n'a passé par le lieu contentieux que par la souffrance et la civilité du propriétaire." Demolombe, 2 Vol. servitudes, No. 634, p. 113.

I do not find that the views thus expressed by Demolombe have been adopted by Marcadé, nor can I find any thing to the same effect in Pardessus. And I must say that I cannot see that, in principle, there is any material difference between the position of the owner of a *fonds enclavé*, who can claim a right of passage, under an express article of the code, and that of an owner of like property, who before the code, could have claimed and obtained, the same right under the same circumstances, and upon the same conditions, under the general principles of the common law.

The passage from Basnage, quoted by Demolombe, does not

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seem to me to make much one way or the other, because Basnage excepts from the general rule which he lays down, those cases where a servitude is founded *sur la loi ou sur la coutume*. And the servitude of passage in favor of a *fonds enclavé* is classed both by the Code Napoleon, and our own Code, among the *servitudes établies par la loi*. (1).

It is not the less true however that some of the very interesting arrêts cited by my brother CASAULT, in effect, declare that the articles 682 and 685 of the code Napoléon are at variance with the old jurisprudence of France, whereas our commissioners say that articles 682, 683 and 684 of our code, "imitated from the code Napoléon" are conformable "to the old jurisprudence and our own," and as to article 685 they declare they "omitted it as useless."

But it is to be recollected that the jurisprudence spoken of in the arrêts to which I have referred is the French jurisprudence in the beginning of the nineteenth century, whereas the jurisprudence of France spoken of by the commissioners is the jurisprudence of that country which affects us, namely the jurisprudence of France before the cession.

It is possible that in the interval between 1663 when the Custom of Paris acquired the force (2) of law in Canada and the year 1804 when the code Napoléon was published, the usage or jurisprudence referred to in several of the French arrêts may have grown up, or such a jurisprudence may even have been established in the interval between the date of the cession and the date of the promulgation of the code Napoléon. Some such supposition seems to be necessary to reconcile the statements to be found in some of the French arrêts as already mentioned and the statement made by our commissioners, as to the French jurisprudence on this subject before the promulgation of the code Napoléon.

In considering this branch of the case I have not failed to

(1) V. Civil Code of Lower Canada, Book 2, Tit. 4, ch. 2, art. 506 and sec. 5, art. 540.

(2) McCord's Civil Code, Preface.

observe that our code does not contain any provision such as is to be found in article 685 of the code Napoléon.

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" L'action en indemnité dans le cas prévu par l'article 682 est prescriptible, et le passage doit être continué, quoique l'action en indemnité ne soit plus recevable."

I do not however see that this article, which expressly sanctions the prescription of 30 years, with respect to the indemnity due for a right of passage, can give us much assistance in determining what effect ought to be given to the immemorial possession which the defendant and his predecessors have had of the passage in question in this cause; and as already observed the commissioners say " as to article 685 of the code Napoléon, by which the indemnity payable for the price and value of the passage is declared to be prescriptible; it has *been omitted as useless*, the action for the recovery of such indemnity, preventing nothing of a particular character, preventing it being subjected to the general rules applicable to prescriptions." (1)

The conclusions which I would draw, from the authorities above considered, are, that if the second contention advanced by the defendant had to be decided, under the provisions of our Civil Code, I would be disposed to say that the land of the defendant is enclosed *enclavé* within the meaning of article 540; and that the defendant having enjoyed the right of passage on the plaintiff for thirty years and upwards, is not liable to be disturbed in his enjoyment, by reason of his not being able to produce a written title as the basis of his enjoyment.

And I am not prepared to say that the code has made any change in our law on this subject.

The ground however upon which the majority of the Court wish their judgment to rest, as already explained, is that, in our own opinion, the road in question ought now to be deemed a public road within the meaning of the 18th Vic. ch. 100.

I regret that the judges have been unable to agree upon the interesting question of law which this case presents, but I

(1) 3 Report of the commissioners, p. 401.

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may observe that our difference of opinion is not of as much importance, in a pecuniary point of view, as it would appear to be.

My brother CASAULT holds that if the defendant in consideration of his property being enclosed *enclavé* had by an incidental demand prayed to be maintained in his right of passage on payment of an indemnity, that he would have been disposed to maintain such a demand, without costs.

Now when it is borne in mind that the piece of road in question occupies about a quarter of an acre of rough, stony land belonging to the plaintiff, which under any circumstances must remain as a road, over which the defendant has a right to pass, for the purposes of his farm P, it seems to me that a very few dollars, or perhaps shillings, would be a sufficient indemnity to the plaintiff, for the defendant being allowed to pass over the same piece of bad land, for the purposes of his farm A. And yet such is the nature and amount of the interest, which has induced the plaintiff, to involve himself and his neighbour in this protracted, expensive and embarrassing litigation.

JUDGMENT :

The Court &c., Considering that the private road established by the deed of the 19 March 1779 from Simon Parent to Alexandre Toupin ought to run exclusively on the land possessed by the plaintiff ;

Considering that the road described in the pleading in this cause, which has been substituted for the said private road, passes not only on the land of the plaintiff, but on the land of the defendant and of several other persons, all of whom and their predecessors, have all used the land necessary for the said road, to the purpose thereof ;

Considering that the last mentioned road has been used by all parties requiring the same as a public road for thirty years and upwards, in fact as long ago as the time to which the memory of the oldest witnesses examined in the case can extend ;

Considering that the said arrangement and the said substitution of the said existing road, for the said private road, has

had the effect of relieving the plaintiff from by much the greater part of his obligations with respect to the said private road, so established by the said deed of 1779, and considering that no sufficient reason has been shown for annulling the arrangement respecting the said existing road, towards which the defendant and several others have contributed land as aforesaid, and which arrangement hath been acquiesced in for 30 years and upwards, and for time immemorial, by the plaintiff, the defendant and all others concerned, and their respective predecessors ;

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And seeing that by the 18 Vic. cap. 100, s. 41, it is provided that any road left open to and used as such by the public ; without contestation of their right, during a period of ten years and upwards, shall be held to have been legally declared a public highway by some competent authority, and to be a road within the meaning of this Act ; it is for the reasons aforesaid, and for the reasons given in the said judgment, which are hereby adopted, considered and adjudged that the final judgment rendered in this cause on the 6th of July 1876 be and the same is hereby confirmed with costs. (Honorable Justice CASULT, diss.)

Langlois, Angers & Larue, pour le demandeur.

G. Amyot. pour le défendeur.

COUR DE CIRCUIT, QUÉBEC

7 JUIN 1878.

No. 1478.

Coram CARON, J.

ROBITAILLE vs. BOLDUC.

JURÉ:—Que lorsqu'un bail à loyer contient la clause que tous les meubles meublant la maison louée sans exception devront répondre et pourront être saisis pour le prix du loyer, le locataire ne pourra plus invoquer les exemptions énoncées aux articles 553, 557 et 558 du code de procédure civile.

Que la clause de saisissabilité de tous les meubles d'un locataire contenue dans un bail, n'est pas contraire à l'ordre public.

Morissette & Robitaille, pour le demandeur.

Suzor & Tessier, pour le défendeur.

SUPERIOR COURT, QUEBEC.

25TH FEBRUARY, 1878.

Coram McCORD, J.

TRUDEL v. DUVAL.

Held :—That a suit brought in the District of Quebec against a defendant residing at Moisie, in the District of Saguenay, for work done there under a verbal hiring at Quebec, will be dismissed on declinatory exception.

Per curiam.—The action is for the price of work done at Moisie in the district of Saguenay, under a verbal hiring which took place at the city of Quebec, and the plaintiff is met by a declinatory exception.

The cause of action is not solely the hiring, as it might have been if it had been for a breach of the contract to work. The action principally originates in the work performed at Moisie, and the hiring at Quebec merely fixes the price to be paid per month for an indefinite time. The *whole* cause of action certainly did not originate in the district of Quebec. *Rousseau v. Hughes*, 8 L. C. R. 187, *Clarke v. Ritchie*, 9 L. C. J. 285, and authorities there cited. Considering, therefore, that it does not appear that the defendant is domiciled in the district of Quebec, or that he has been personally served therein, or that the whole right of action in this cause originated in the said district, the declinatory exception must be maintained with costs.

Action dismissed.

Drouin & Lapointe, for Plaintiff.

Taschereau & Fortier, for Defendant.

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10 OCTOBRE, 1878.

No. 1783.

Coram CASAULT, J.

SHAW v. BOURGET,

ET

LA CORPORATION DES PILOTES, T. S.

Jugé :—Que les pensions accordées aux pilotes infirmes, en vertu de la 45 Geo. 3 Cap. 12, s. 11, et de la 12 Vic. Cap. 114, s. 61, sont insaisissables.

Autorités :

L. C. R. vol. 3, p. 420, *Lelièvre v. Baillargeon* et la Maison de la Trinité, T. S.

Code de Procédure Civile, article 558

Ross & Stuart, pour le Demandeur.

Langlois, Angers, Larue & Angers, pour la Corp des Pilotes.

SUPERIOR COURT, QUEBEC.

25TH FEBRUARY, 1878.

Coram McCORD, J.

RUEST v. GRAND TRUNK RAILWAY CO.

Held :—That the claim for damages for the death of a person resulting from a quasi offence, forms no part of his succession, and by article 1056 C. C., under which alone an action for such a claim will lie, the brothers and sisters of deceased have no right of action.

Per curiam.—It would appear according to the allegations of the declaration that on the 19th May 1877, Octave Ruest met

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G. T. & Co. with his death in consequence of having fallen through a pavement or foot path belonging to the Grand Trunk Company, who had failed to keep said pathway in proper repair.

The father and mother of Ruest, together with two minor brothers and a minor sister, all represented by the father as tutor, now sue the Grand Trunk Company for \$2000 damages.

The defendants by *défense en droit* demand the dismissal of the action, substantially on the ground that three of the defendants, the brothers and sister, have by law no right of action.

Had a claim of this kind formed part of the succession of Octave Ruest, these collaterals might have had a right of action under article 626 of the Civil Code, according to which the succession of Octave Ruest would have devolved to his father and mother, and brothers and sister.

But no such action lies except under the terms of article 1056, the express inclusiveness of which excludes the right of any other persons than those therein mentioned. According to the terms of this article the "consort and ascendant and descendant relations" can alone have the right to claim damages for death occasioned by quasi-offence. In so far therefore as the brothers and sister of Ruest are concerned, the action is not founded and the *défense en droit* will be maintained *quoad* them.

I feel justified in rendering judgment in this case against three only of the plaintiffs by the terms of article 1056, which not only authorizes but requires a joinder of plaintiffs and enables the court to deal separately in the one case with the claim of each plaintiff.

The action is therefore dismissed with costs in so far only as the minor children represented by their tutor are concerned.

Considering that the claim for damages resulting from the death of Octave Ruest forms no part of his succession, and that under article 1056 of the Civil Code, under which alone an action for such damages will lie the brothers and sister of the said Ruest have no right of action.

Considering further that the said article 1056 authorizes the court to adjudicate upon the claim of each of the plaintiffs separately. Ruest
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Doth maintain the *défense au fonds en droit* of the defendants as against the plaintiff Charles Ruest, in his quality only of tutor to his minor children, and doth dismiss with costs the action of the said Charles Ruest as such tutor in this case.*

Judgment accordingly.

Taschereau & Fortier, for Plaintiffs.

Andrews, Caron & Andrews, for Defendants.

COUR SUPÉRIEURE, QUÉBEC

10 OCTOBRE, 1878.

No. 1877.

Coram CASAULT, J.

CONVEY v. SMILEY,

ET

CARPENTER,

Adjudicataire.

ADJUDICATAIRE—BREF DE POSSESSION.

Jugé :—1° Que l'adjudicataire qui demande l'émanation d'un bref de possession, ne peut l'obtenir avant d'avoir payé le montant de son adjudication.

2° Qu'avais de sa requête doit être signifié au défendeur.

(Code de Proc. 712, 713, 690.)

Andrews, Caron & Andrews, pour le Demandeur.

SUPERIOR COURT, 1878.
SUPERIOR COURT, QUEBEC.

25TH FEBRUARY, 1878.

Coram McCORD, J.

REES *v.* MORGAN,
And BAILLIE, Intervening.

Held:—1. That articulations of facts will not be admitted in an issue upon a preliminary plea.

2. That an intervention allowed, filed and served between the service and entry of the principal action, is not premature, the principal action being *pending* within the meaning of article 154 C. C. P., from the moment of the service of the writ and declaration constituting the demand.

3. That the service of an intervention upon the plaintiff's attorney is a sufficient service upon the plaintiff.

Per curiam.—The plaintiff moves to reject articulations of facts produced by the intervening party, the issue being only on an exception to the form.

Article 207 C. C. P., provides that articulations must be filed "within two days after the issues are perfected," without saying what issues, but the wording of section 87 of the C. S. L. C., Cap. 83, from which that article is taken, is "within two days after any issue is joined upon which evidence is to be adduced." I would therefore be disposed to apply article 207 even to issues upon an exception to the form, but I find that it has already been decided by Judges STUART, CASALTY and TESSIER, that articulations of facts are not admitted upon preliminary pleas, and I therefore concur in this opinion so as not to disturb an existing practice. The motion is granted, and the articulations rejected with costs.

Taking now the exception *à la forme* on its merits, I find the action was served on the 10th December and was returnable on the 31st. The petition in intervention was allowed and filed 19th December, and served on the 20th, on defendant and on the attorneys for plaintiff. The plaintiff attacks this intervention by exception *à la forme* on the ground 1° that the action

not being *pending* (154 C. P.) the intervention is premature and illegal. 2° That the intervention was not served on the plaintiff (157, C. P.).

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The first ground is bad ; the suit is pending from the moment of the service of the writ and declaration constituting the *demande*.

Bioche, vo. Exception, 132. " La litispendance suppose une *demande judiciaire*, c'est-à-dire une *assignation*."

As regards the other ground, it raises the question of the sufficiency of the service of an intervention upon the *attorneys of the parties*.

The French version of the code of procedure, article 157, merely requires *signification aux autres parties en cause*, and service upon the attorneys it seems to me is a sufficient signification to the parties. The English version of the article and of the statute C. S. L. C. 83, s. 71, uses the terms *service upon the parties*, but still I think that between parties to a suit services upon the attorneys is sufficient.

Guyot vo. Signification, à propos of *service of judgment upon the party condemned*, says : " Si elle a eu un procureur pour la défendre, le jugement doit en premier lieu être signifié à cet officier conformément à l'article 2 des tit. 27, de l'ord. 1567. Les arrêts ou sentences ne pourront être signifiés à la partie s'ils n'ont été préalablement signifiés à son procureur, en cas qu'il y ait procureur constitué." And both Guyot and Jousse say " that this provision is founded upon the supposition that the attorney is better able to watch the interests of the party than the party is himself."

Bioche says, vo. Intervention, No. 63 : " Cette requête est grossoyée et signifiée d'*avoué à avoué*." And No. 68, " Si le défendeur n'a pas d'*avoués constitués* la requête en intervention ne peut être signifiée qu'à personne ou domicile."

Rogron on article 339, (which like the article of the Ord. 1667 says " dont il sera donné copie,") explains that " cette requête est signifiée par l'*avoué* de l'intervenant aux *avoués* des parties en cause."

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Moreover the law is expressly jealous of the proceedings in suits being retarded by interventions, and to require, as in the present case, that a plaintiff residing in England should be served otherwise than by furnishing copy to his attorney would be to retard proceedings contrarily to the interests of the plaintiff himself.

Considering that the service of process in this suit had taken place and that the said suit was consequently pending when the intervention of the intervenant was allowed and filed.

Considering that the service of the said intervention upon the attorneys of the plaintiff is a sufficient service upon the said plaintiff. The Court doth dismiss the said exception *à la forme* with costs.

Blanchet & Pentland, for Plaintiff.

Langlois & Campbell, for Intervening Party.

COUR DE CIRCUIT, QUEBEC.

23 OCTOBRE 1878.

No. 2404.

Coram MEREDITH, J. C.

GAGNON vs ROBITAILLE.

JURÉ :—Que la demande de paiement faite de la part d'un créancier par l'entremise d'une personne inconnue au débiteur et non munie d'une procuration, n'est pas une mise en demeure, quand le débiteur ne nie pas devoir, mais refuse seulement de payer à cette personne.

Il s'agissait d'une somme de trois piastres et demie due à la demanderesse pour ses services comme servante du défendeur. Avant l'institution de l'action, une personne se représentant être l'oncle de la demanderesse se présenta chez le défendeur, et lui fit une demande de paiement de la part de la demanderesse. A cela, le défendeur répondit qu'il réglerait avec la demanderesse. La

demanderesse sans autre demande poursuit le défendeur pour le recouvrement de cette somme. Le défendeur par son plaidoyer prétendit qu'on ne lui avait pas fait de demande de paiement, et offrit le montant de la demande sans frais. La cour a maintenu les prétentions du défendeur, déclarant que l'oncle de la demanderesse n'étant pas porteur d'une procuration et étant inconnu du défendeur, la demande de paiement faite par lui n'opérait pas une mise en demeure légale.

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v.
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Jugement pour trois piastres et demie sans frais.

Malouin & Malouin, pour la demanderesse.

Gauthier & Choninard, pour le défendeur.

SUPERIOR COURT, QUEBEC.

8TH FEBRUARY, 1878.

Coram MEREDITH, C. J.

PATTERSON vs. KNIGHT,

A charter party provided that the vessel was to receive cargo at Quebec "on or before the 10th August next or this charter is cancelled." The vessel arrived in port, in ballast, only on the morning of the 10th, and no ballast was discharged on that day. On the same afternoon the ship's agent notified the charterer, by protest, that the ship was ready for loading, and demanded a cargo, which the latter refused to give, alleging that the said ship was not ready to receive cargo according to agreement.

Held :—That the charter party had become cancelled according to its terms, the ship not being ready to receive cargo or fulfil its obligations either literally, substantially or according to the usage of trade at Quebec.

MEREDITH, C. J.,

The parties in this cause on the 5th July last entered into a charter party, respecting the ship *Louisa*, then at sea, bound to Quebec, by which the charterers agreed to load the said ship with a "full and complete cargo (with lawful deck load if required by the Master) consisting of square timber one fourth large Oak, Elm and Ash; remainder of large square and

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Knight. " waney White Pine timber, with suitable timber or dry Deals
" at charterer's option, at full freight for beam fillings, and dry
" Deals for poop and houses, and sufficient suitable dry Deals,
" Deal ends, Staves and Lathwood as required by the master,
" for broken stowage only."

The charter party, concluded with these words: "It is understood that the vessel is to receive cargo, on or before the 10th August, next, *or this charter is cancelled.*"

The ship *Louisa*, came out in ballast, and reached Quebec on the morning of the said 10th day of August, and by six o'clock of that day had reached her discharging berth, having however on board all her ballast, consisting of about 400 tons of clay.

It is admitted that no part of the ballast was taken out of the ship that day.

On the 10th of August the agents of the ship by protest, demanded a cargo in pursuance of the charter party, and in their protest they alleged that the said vessel *is now ready to receive cargo.*

The defendant, on his part, also by protest notified the agents of the ship, "that in consequence of the said ship *Louisa*, "not being ready to receive the said cargo according to the "agreement; the said Alfred F. Knight holds the said charter party to be at end, cancelled and void."

To which the agents of the ship answered "the *Louisa* is in "her discharging and loading berth, the captain and the agents, "are, and have been, ready to receive cargo or orders; both of "which have been requested from Mr. Knight by letter and "protest, to which refer."

We thus see that the plaintiff, on the 10th of August claimed a cargo on the ground that the said ship *is now ready to receive cargo*, and that the defendant refused a cargo in consequence of the said ship *Louisa*, *not being ready to receive the said cargo according to agreement*; and, it seems to me, that a decision as to which of those two contentions is right, involves a decision of the whole case.

The learned counsel for the defendant put the following questions to all their witnesses examined as to this part of the case.

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" Was the *Louisa* of 980 tons, arriving here in ballast on the 10th of August at 6 P. M., at the berth where she was to discharge her ballast, but had not yet discharged it, which berth was also to be her loading berth, ready at that time to receive the cargo mentioned in the said charter party ? "

And they all, namely Messrs. R. H. Smith, E. C. Fry, E. H. Duval, J. Dick (port warden) and P. McNaughton, being men of experience, and competent to speak on the subject, answered that question by an unqualified " no." Mr. Dick whose evidence, as port warden, is particularly deserving of attention, says that on the 11th August at 45 minutes past 4 P. M. the vessel was not ready to receive her cargo of timber; and had then about $\frac{1}{4}$ ths of her full quantity of ballast on board, and he adds " on the 13th I went on board of her again, at 5 P. M., she was still not ready, she was still in the same condition only a little more ballast out of her."

This evidence, if indeed evidence on the subject was required, seems to establish beyond doubt the correctness of the defendant's contention.

The evidence, thus adduced by the defendant, is not materially weakened by that adduced, by the plaintiff. Not counting the plaintiff's agent, and his clerks, nor the defendant, the plaintiff examined five witnesses, J. Clark, J. F. Golden, J. Connolly, P. McNaughton, and J. Bordeleau.

Mr. Clark, a timber tower, in answer to the question, Is it customary to begin loading vessels with square timber before the ballast is out. Answered, " Not that I know of, before the ballast is taken out to a certain extent."

Mr. Golden in answer to a certain question of the same nature answered that as a general rule a vessel begins by discharging, and then takes in cargo.

Messrs. Connolly, McNaughton and Bordeleau give evidence to the same effect; and I cannot imagine how they could have done otherwise.

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It was however contended that under the charter party the *Louisa* was bound to take on board suitable timber and dry deals for beam fillings, dry deals for poop and houses, and dry deals, deal ends, staves and lathwood for broken stowage, that she could have taken a portion of these things on board on the 10th, and that, therefore, she was on that day, in a state to carry out the charter party.

I cannot however adopt that view. I regard the deals, deal ends, and things of that kind, as not being part of the cargo on account of which the charter party was entered into ; but rather as things to be taken, in consequence of the shipment of the cargo ; in other words, they were the accessories, or complement of the cargo.

This view is borne out by the words of the charter party which speaks of the complete cargo as consisting of square timber, one fourth *cargo* oak, elm and ash, remainder of *cargo* square and waney white pine timber, and then having thus described what the whole of the *cargo* was to consist of, follow the words, with suitable timber or dry deals for the purposes already mentioned, and the words of the important final clause are, to receive *cargo* (meaning cargo as already described) on or before the 10th of August *or this charter is cancelled*.

It seems to me sufficiently plain that the object of this covenant was not to stipulate that the *Louisa* should be ready to receive the deals and deal ends for beam fillings, broken stowage, and the like ; for I suppose any vessel could, at almost any time, receive on board a certain, and indeed a considerable, quantity of such things.

It was also contended that although the *Louisa* had still her ballast on board the defendant might have delivered the square timber to the ship, and allowed it to remain along side, as is often done, at the risk of the ship. And I observe that the answer of the agents to the defendant's protest on the 10th of August is. "The Captain and we as agents are and have been " ready to receive cargo or orders." I however, am clearly of opinion that the defendant was not bound to deliver his timber to either the Captain or agents until the ship was ready to receive it.

Admitting that the timber would have been at the risk of the ship, from the moment of delivery to the master, I hold that the owner of the timber was not bound to rely on that responsibility, for any longer time than was necessary, after the ship was ready to receive the cargo. Patterson
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Another point urged by the plaintiff was that unless the breach of a contract goes to the whole root and consideration of it, the covenant broken is not to be deemed a condition precedent. (1) That is true, but the Covenant in this case leaves no room for doubt; the words are the "Vessel is to receive cargo "on or before 10th August next or this charter cancelled."

With these words before us all that we have to ascertain is, did the ship receive cargo on the 10th of August. Or if the defendant had been willing to furnish cargo, could she have received it on that day. The first enquiry must, it is admitted, be answered in the negative, and according to my view the second must be answered in the same way.

The plaintiff seemed to think the course pursued by the defendant in this cause very unreasonable, if not unfair, the defendant, as it was said, not having sustained damage to the extent of a penny by the late arrival of the *Louisa*.

This consideration would doubtless have much weight if the defendant were now claiming damages, but it is the plaintiff who claims the damages, not the defendant. And as the *Louisa* arrived too late to carry out the contract, the plaintiff could hardly expect that the defendant would extend the time for the fulfilment of the contract, so as to secure, at his own expense, a considerable profit to the plaintiff.

Being then, as I am, of opinion, that on the 10th of August the plaintiff was unable to fulfil his obligations under the charter party, either literally, substantially, or according to the usage of trade, I cannot avoid holding that, according to its terms, it became cancelled on that day, and consequently that the present action cannot be maintained.

Judgment accordingly.

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Cook, for Plaintiff.

Ross, Stuart & Stuart, for Defendant.

Confirmed in appeal 4th September 1878. Present : Sir A. A. DORION, C. J., and MONK, RAMSAY, TESSIER & CROSS, J. J.

SUPERIOR COURT, QUEBEC.

8th FEBRUARY 1878.

Coram MEREDITH, C. J.

POWELL vs. PATERSON.

DAMAGES FOR ISSUING SAISIE-ARRET BEFORE JUDGMENT.

Plaintiff, being about to give up Bar Keeping, and remove to another house, advertised his goods for sale by public auction, being at the time indebted in \$104, to defendant, as assignee of an Insolvent Estate. Defendant had made frequent applications for payment, and plaintiff had constantly promised to pay but had failed to do so. Defendant seeing the plaintiff's advertisement, caused an attachment to issue, which was contested by plaintiff, and it being shown that there was no intention to secrete on his part,

Held:—That the process of saisie-arret before judgment could not be made use of as a means of compelling dilatory debtors to pay doubtful debts, that process being allowed by law only against debtors guilty of fraud; that the plaintiff had disproved the charge of fraudulent secreting, and had a right of action; but as the defendant had acted as a public officer, and without any feeling of malice towards the plaintiff, and as the latter had not suffered any real damages, and moreover, had not acted as he ought to have done, towards his creditors, damages assessed at \$20, with costs as in an action for \$60.

MEREDITH, C. J.

This is an action of damages for the issue of a saisie-arret before judgment without probable cause, and the plea is the general issue.

The plaintiff, a mill-wright by trade, about two or three years ago, married a Mrs. Hillier, who kept a Restaurant and bar in this city, and since his marriage he appears not to have

worked at his trade, but to have assisted his wife in the business so carried on by her.

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The plaintiff, from May to December 1875, became indebted to Mr. Joseph K. Boswell, now represented by the defendant, as the assignee of his Insolvent Estate, in \$104 30 for Ale and Beer, supplied for the plaintiff's restaurant.

Very numerous applications were made for payment of the account so due, plaintiff constantly promised to pay, but failed to do so, and in the month of March 1876 an action was instituted by the plaintiff as Assignee of Boswell's Estate, against the plaintiff.

In the following month, that being about five months after the delivery of the last item in Mr. Boswell's account, the plaintiff, being about to give up the business of keeping a restaurant and bar, and to change his residence to a house in this city, which he had leased from Mr. Hearn, advertised an auction of his bar, hotel fittings and a lot of other goods.

The sale was advertised for the 20th April, took place on that day, and produced about \$40, not including the articles bought in for the plaintiff.

The attention of the defendant was drawn by one of his clerks to the plaintiff's advertisement, and thereupon he sued out a *saisie arrêt* before judgment. The affidavit made by the defendant is in the following words.

"Que le déposant est informé d'une manière croyable, et a toute raison de croire, et croit vraiment et sincèrement en sa conscience que le dit Joseph F. Powell, le présent défendeur, est immédiatement sur le point de receler, cacher et enlever ses biens, dettes, meubles, et effets, dans la vue de frauder ses créanciers, et le dit Pemberton Paterson en sa susdite qualité en particulier"

Under the attachment so sued out, the plaintiff's household furniture, including a piano and sewing machine, were seized; and hence the present action.

The plaintiff examined the defendant as to his reasons for

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suings out the attachment; and the defendant as was to be expected, answered with perfect candour.

His examination as to his reasons for taking out the attachment is as follows.

Question.—By whom were you informed that the present plaintiff was then immediately about to secrete his estate, debts and effects with intent to defraud his creditors and you in particular in your said quality of assignee?

Answer.—By seeing an advertisement in the "Chronicle," of the whole of his goods and effects to be sold by auction.

The defendant is in error in saying that the plaintiff advertised the "whole of his goods," and it is in proof that, after the sale by auction, the plaintiff removed ten loads of furniture and household effects, from the establishment which he was leaving in St. Peter street, to the house which he had taken from Mr. Hearn.

The remainder of the defendant's examination is as follows.

Question.—"Were you informed by any person, and if so "please state by whom, that this was being done in fraud of "his creditors."

Answer.—"No one: but the goods having been sold, and "the money paid over to Powell, I felt satisfied I could never "recover my debt."

Question.—"Did you, before taking out the said seizure, "make any inquiries as to the intentions of the plaintiff to continue his business, or to go into any other line of business, or "as to what was the object of his calling an auction of his "goods and effects?"

Answer.—"No."

Question.—"Was all your information then of his concealing "his estate, debts and effects, derived from the fact of his calling "an auction as already mentioned?"

Answer.—"Yes."

"In the whole matter I had no personal interest and merely acted in my quality of assignee in order to secure my debt."

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Notwithstanding the important admissions thus made it is contended on the part of the defendant, that as the claim he sued for was long past due,—as repeated promises to pay it had been broken ; and as the plaintiff was selling off a considerable portion of his effects, without consulting his creditors in any way—that the defendant in order to obtain an attachment had a right to swear that the plaintiff was secreting his property for the purpose of defrauding his creditors ; and that although Powell might perhaps have caused the attachment to be set aside, yet that Paterson had reasonable and probable cause for making the affidavit, and that therefore he cannot be held liable in damages. I readily admit that there is an important difference between the question to be decided upon a petition to quash an attachment, and that to be decided where damages are claimed for an illegal attachment.

On a petition to quash the attachment, it would have been in vain for Paterson to prove that he had reasonable and probable cause for the course which he had pursued, if Powell succeeded in showing that when the affidavit was made he was not secreting or about to secrete his property for the purpose of defrauding his creditors, whereas in the present case it would be useless for Powell to prove that he was not secreting his property for the purpose of defrauding his creditors, if Paterson could prove that he had reasonable and probable cause for believing that Powell was about to do so. (1)

In the present case, Powell not only was not secreting his property for the purpose of defrauding his creditors, but Paterson in my opinion, had not reasonable and probable cause for accusing Powell of such conduct.

If Paterson instead of suing out the attachment, without, as he frankly admits, making any enquiry, had taken ordinary precautions, he could have ascertained that the present plaintiff bore the character of an honest man, that he had leased a house, in another part of the town, to which he was removing, that the

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things which he had sold formed but a small part of his effects, and were no longer required by him as he was giving up his bar and restaurant, in fact, that there were no reasonable grounds for the charge that the plaintiff was fraudulently secreting his property. •

It is quite true that the defendant as he says, acted in his quality of assignee, merely for the purpose of securing a debt due to the estate which he represented, and without any kind of bad feeling to the plaintiff, but it is equally true that he has done a wrongful act, without sufficient excuse, and must therefore be held responsible for the damages caused by his wrongful act. Reference was made at the argument to the case of *Dunn v. Rooth*. In that case the jury found the defendant had acted without reasonable or probable cause, expressly negatived the charge of malice, and assessed the damages at \$500. I gave judgment in favor of the plaintiff, for the damages found by the jury. My judgment was confirmed by the Court of Review, one judge dissenting. In appeal Mr. Justice CARON and Mr. Justice MONK were for confirming; but DUVAL C. J. and DRUMMOND and BADGLEY J.J. reversed the judgment of the lower court, one of the considerations of the judgment of appeal being:

“ That the facts proved in this cause were legally sufficient to constitute probable cause for each of the said appellants for the commission of the said separate act alleged to have been done by him, and that the finding against each said appellant, defendant aforesaid, of want of probable cause, is altogether unsupported in fact.”

It is thus plain that in *Dunn v. Rooth* none of the judges, in appeal, thought that the plaintiff's action could be dismissed merely on the ground that the jury had negatived the charge of malice, and on the contrary that they all made their judgments turn on the question: Had the defendants reasonable and probable cause for the course which they pursued.

Being, as I am, of opinion, that in the present case, that question must be answered in the negative, it remains only for me to say, that there are no grounds for granting vindic.

tive damages, (1) and that it does not appear that the plaintiff suffered any actual damage from a part of his furniture being placed for a time in the possession of his brother in law, named by himself as guardian.

Still the plaintiff had a right to bring the action, were it only for the vindication of his character. The damages awarded to him ought to be sufficient, at least to indemnify him for the loss of time incident to the litigation in which he has been involved by the illegal conduct of the defendant; and although I bear in mind that the latter acted as a public officer, and without any feeling of ill-will to the plaintiff, who did not act as he ought to have done, towards his creditors, I do not feel I would be justified in assessing the damages at less than \$20, the costs to be taxed as in a 2nd class action in the Circuit Court under \$60.

I would not have deemed it necessary to enter into the above explanations as to the questions of probable cause, and malice, had not the learned counsel for the defendant,—who I know would not make any statement which he did not deem well founded,—declared that if a judgment could go against the defendant in this case, it would be hardly possible for any creditor to be safe in suing out a *saisie-arrest* before judgment. I do not however think that any such inference can be drawn from this present judgment. According to my view, the defendant acted upon the erroneous, but not uncommon, opinion that the writ of *saisie-arrest*, before judgment, may be used as a means of compelling dilatory debtors to pay doubtful debts, whereas the law allows it to be used only against debtors guilty of fraud, (2) as is evident from the fact that in order to obtain such a writ there must be an affidavit establishing “that the defendant absconds, or is immediately about to leave the province, or is secreting his property *with intent to defraud his creditors.*”

The judgment will go for \$20, damages, with costs as in a case under \$60.

Langlois, for Plaintiff

Cook, for Defendant.

(1) 2 L. C. Jurist, p. 120.

(2) 17 L. C. R. p. 483.

COUR DE RÉVISION, QUÉBEC.

31 DÉCEMBRE 1869.

Coram MEREDITH, J. C., STUART ET TASCHEREAU, J. J.O'FARRELL *et al.*, vs. RECIPROCITY MINING CO.

JUGÉ :—Que la formalité d'un jugement déclarant une cause terminée n'est pas nécessaire pour donner droit à un procureur au recouvrement de ses justes honoraires et déboursés contre son client, si la preuve et les circonstances constatent qu'il y a eu règlement hors de cour et que le litige a pris fin.

La Cour, etc. " Considérant que les Demandeurs n'ont établi en preuve l'existence d'aucune convention entre eux et les défendeurs, au moyen de laquelle ces derniers se soient obligés de leur payer une somme plus forte que les frais et honoraires auxquels ils avaient droit comme leurs procureurs en les diverses causes mentionnées en leur déclaration en cette cause, et qu'en autant la réclamation des demandeurs pour telle somme en sus de leurs frais et honoraires, réglés par le tarif au montant de trois mille cent soixante-et-sept piastres, ne peut leur être accordée, et leur a été justement refusée par la Cour Supérieure siégeant à St. Joseph, suivant son jugement en date du treize octobre mil huit cent soixante-et-neuf ; considérant que les demandeurs par leur action allèguent spécialement que les diverses causes mentionnées en leur déclaration, et pour lesquelles ils réclament leurs déboursés et frais, sont terminées et réglées, que ce fait n'a pas été spécialement nié par les défendeurs, et que, par la preuve, il est constaté que les dites causes sont terminées et réglées, quoiqu'il ne soit pas intervenu un jugement à cet effet ;

" Considérant que la formalité d'un jugement déclarant une cause terminée n'est pas, dans l'opinion de ce tribunal, nécessaire pour donner droit à un procureur au recouvrement de ses justes honoraires et déboursés contre son client si la preuve et les circonstances constatent qu'il y a eu règlement et que le litige a pris fin.

La Cour, considérant qu'il y a eu erreur dans cette partie du jugement du treize octobre mil huit cent soixante-et-neuf qui déboute les demandeurs de cette partie de leur demande, au montant de mille neuf cent vingt piastres et cinquante cinq

centins, montant de leurs deux mémoires de frais produits en cette cause, et que cette somme aurait dû être accordée aux demandeurs par la dite cour, casse et annule cette partie du dit jugement, et condamne les défendeurs à payer aux demandeurs la dite somme de mille neuf cent vingt piastres et cinquante-cinq centins pour les causes susdites, avec intérêt sur icelle à compter du huit janvier, mil huit cent soixante-et-neuf, et les dépens tant dans cette cour que dans la Cour Supérieure.

O'Farrell
et al
v.
Reciprocity
Mining Co.

O'Farrell, pour les Demandeurs.

Bossé, pour les Défendeurs.

COUR SUPÉRIEURE, QUÉBEC.

1878.

No. 132.

Coram CARON, J.

IN RE PITON *et al.*, *Faillis.*

FAILLITE—CONSEIL A L'ENQUÊTE.

Jugé :—Qu'à l'enquête sur requête pour faire annuler l'acte de cession, les parties ont droit à un conseil, et que l'honoraire de ce conseil doit être taxé à dix piastres comme dans les causes ordinaires.

Le protonotaire avait retranché cet honoraire. Les intimés en appelèrent de cette décision. Ils citèrent l'avant-dernière clause du tarif fait en vertu de l'acte de faillite, et lequel réfère au tarif de la Cour Supérieure pour toutes affaires incidentes, et de plus une décision rendue par l'Hble. juge-en-chef MEBEDITH dans une cause en faillite, No. 122, *Ontario Bank vs. Dastous et al.*, dans laquelle après en avoir conféré avec les honorables juges CASALT et DORION, l'honorable juge-en-chef avait décidé "que les honoraires du conseil à l'enquête doivent être accordés quand la contestation est liée sur le montant dû, et que ce montant tomberait sous la juridiction de la Cour Supérieure."

In re Piton
et al.,
Faillie.

Dans la présente cause, les trois intimés avaient séparé leurs défenses bien qu'elles fussent identiques. Sur la décision ci-haut rendue sur l'une des contestations, le protonotaire accorda l'honoraire des conseils à l'enquête dans les deux autres contestations.

Sewell & Gibsone, Procureurs de la Requérante.

Amyot & Casgrain, Procureurs du Syndic et des Intimés.

SUPERIOR COURT, QUEBEC.

28 JUNE 1878.

Coram CARON, J.

BERTRAND vs. POULIOT, and POULIOT, Opposant.

OPPOSITION AFIN D'ANNULER—PLEA TO.

Held:—That an Opposant may at once demand from Plaintiff a plea to the opposition, instead of moving upon him under article 586 C. P., to declare whether he contests the same or not.

Alleyne & Chauveau, for Plaintiff.

Dechene, for Opposant.

QUEEN'S BENCH, APPEAL SIDE.

QUEBEC, 8th MARCH 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J.*Ex parte* DALLAIRE,Petitioner for *Habeas-Corpus*.

1. The commitments in this cause which set out the acts of the defendant, without specifying time, place or circumstance, and without stating such acts to have been illegally done, *held*, insufficient and quashed.

2. Where a commitment appeared to be bad, a certified copy of the conviction allowed to be produced to show that there was no valid conviction to support such commitment.

The Court, on the petition of the prisoner, having ordered the issue of a writ of Habeas-Corpus, the return of the Gaoler of the district of Quebec to the writ shewed that the prisoner was detained on the following commitments:

1. Under a conviction by Isaïe Nolet, Esquire, Justice of the Peace, of the said Dallaire, " attendu qu'il a été ce jour convaincu devant le soussigné, un des juges de paix de Sa Majesté dans et pour le district de Québec, d'avoir insulté et injurié en paroles Joachim Bédard, Ecuier, J. P., ce dernier étant en devoir, le traitant de maudite canaille, d'enfant de chienne, de maudit bâtard, et autres expressions injurieuses, et qu'il a été par la dite conviction ordonné, que le dit Dallaire à raison de son dit délit sera tenu de payer dix piastres d'amende y compris les frais, et qu'il a été ordonné par la dite conviction que si les dites diverses sommes n'étaient payées immédiatement le dit Dallaire serait emprisonné dans la prison commune pendant deux mois," and the commitment proceeded to order the the petitioner should be imprisoned at hard labour for two months unless the fine should be sooner paid.

2nd and 3rd commitments, under convictions by Joachim Bédard, J. P., and Isaïe Nolet, J. P., of the said Dallaire " for assault upon Félix Durand and Edouard Durand respectively," without statement of time, place or circumstance, or unlawful-

**Ex parte
Dallaire.**

ness. These commitments also ordered fine or imprisonment as did the former.

4th. A commitment ordering imprisonment as before, under conviction by the same justices, of the said Dallaire, "pour avoir été rebelle au constable spécial, qui l'avait arrêté pour assaut, et lui avoir déchiré sa blouse, le traitant d'enfant de chienne et d'autres expressions injurieuses." The name of the special constable was not stated.

The court having ordered service of a notice of the application upon the Clerk of the Crown, *R. Alleyn, Q. C.*, appeared for the Crown; the justices appeared in person and filed a petition in writing, signed by themselves, being their defence to Dallaire's application and praying for its dismissal.

O'Farrell, for the prisoner, submitted that the commitments were insufficient and must be quashed. He presented certified copies of the convictions in order to shew that there was not a good conviction behind the commitment, and cited the following authorities to shew that a conviction may thus be produced to defeat the commitment, viz: *R. v. Mellor*, 2 Dow. 173, *In re Boothroyd*, 15 M. & W., 1, *R. v. Chaney*, 6 Dow. 281, *In re Fletcher*, 2 D. & L. 726, *In re Reynolds*, 1 D. & L. 846. He urged that the convictions as shewn by the certified copies did not give any more information than the commitments, and did not state either *time*, which is sacramental by reason of the limitation of three months, or *place*, which is essential by reason of the limited territory of the magistrates' jurisdiction, and did not even assert any one of the prisoner's acts to have been unlawful.

Alleyn Q. C. è contra.

The Court quashed the commitments as illegal and insufficient, and ordered the said Dallaire to be discharged out of custody.

Judgment accordingly.

COUR SUPÉRIEURE, QUÉBEC.

No. 2421.

Coram CASAULT, J.

GROSLEAU vs. THE Q. N. S. T. ROAD TRUSTEES.

Jugé :—Que l'honoraire, article 32 du tarif, sera accordé pour *réaudition*, quand le débiteur est déchargé, sans la faute des procureurs, et que la cause est plaidée de nouveau au mérite.

Ainsi jugé sur appel, par le demandeur, de la taxation du mémoire de frais par le protonotaire.

G. Amyot, Procureur du Demandeur.

Ross, Stuart & Stuart, Procureur du Défendeur.

SUPERIOR COURT—IN REVIEW.

QUEBEC, 30TH NOVEMBER, 1876.

Coram MEREDITH, C. J., CASAULT, J., DORION, J.

MCGREEVY vs. GINGRAS *et al.*,

And COTÉ Intervening.

Held :—1° That, under article 158, C. C. P., an Intervenant is bound, within eight days from the admission of his Intervention, either to furnish any further grounds he may have to set up in the principal suit, or to notify the parties that he has no further grounds to offer.

2° That, without proof of the allegations of his Intervention he cannot obtain the conclusions thereof.

This was a case of *saisie-gagerie par droit de suite*.

The intervenant claimed as belonging to him an agricultural implement, called "*une arracheuse de patates*," and asked to have it

McGreory
v.
Gingras
et al., withdrawn from the seizure and delivered over to him. His intervention was filed and allowed on the 15th May 1876.

On the 30th May, 1876, intervenant filed a demand of Plea, with proof of service on both parties; and on the 5th June, 1876, intervenant foreclosed the parties from pleading to his intervention, and inscribed his case *ex parte* on the merits, with notice served on the parties for the 7th June, 1876; without producing any evidence of the allegations of his intervention, he submitted the case for judgment *ex parte* on the 7th June, 1876; and the Superior Court, on the 8th July, 1876, gave judgment *ex parte* granting the conclusions of the intervention with costs.

The judgment in review, reversing the said judgment of the Superior Court is in these words :

Seeing that the plaintiff did not answer the demand of intervention of the said C. T. Côté, within eight days after service thereof on him, the plaintiff, and that, thereupon, according to article 158, of the code of civil procedure, the right of the said C. T. Côté, to intervene in this case became admitted, as against the said plaintiff;

And seeing that, according to the said 158th article of the code of civil procedure, an intervening party "is bound within " eight days from the admission of his intervention to furnish " any further grounds he may have to set up in the principal " suit," and that, if he, the said intervening party, did not deem it necessary to furnish any further grounds in support of his intervention, he ought to have given notice to that effect to the plaintiff; and considering that, according to the said article, and according to the course and practice of this court, the intervening party had not a right to have and obtain the conclusions of his intervention, without proof of the material allegations contained in the said intervention—and therefore that there is error in the judgment rendered in this cause on the eight day of July last, which, without any proof whatever of the truth of the allegations of the said intervening party, ordered a certain implement of agriculture, called "*arracheuse de patates*," seized in this cause, at the suit of the plaintiff, as belonging to the defendant, to be delivered up to the intervening party,—doth, in consequence, reverse and set aside the said judgment so rendered in this cause,

on the eighth day of July last, and doth set aside the inscription by the intervening party of this cause for hearing *ex parte* on the merits, in order that the said intervening party may proceed upon his intervention as to law and justice may appertain." McGreovy
v.
Gilmour
et al.,

Judgment of S. C. reversed.

Andrews, Caron & Andrews, for Plaintiff.

MacKay & Turcotte, for Intervenant.

SUPERIOR COURT, QUEBEC.

19TH SEPTEMBER, 1878.

Coram CASAULT, J.

SYNDICS DE ST. HENRI vs. CARRIER.

HELD:—That, when the judiciary oath is deferred by the Court, the parties will be heard anew if they so desire.

Per Curiam.—Ordonné, avant faire droit, que le défendeur comparaisse devant ce tribunal le premier octobre prochain, à 10½ h. du matin, pour alors et là répondre, sous le serment judiciaire, aux questions qui lui seront posées par le tribunal, puis être les parties entendues de nouveau, si elles le désirent, le cinq du même mois à la même heure.

Blanchet & Pentland, for Plaintiffs.

Bossé, Q. C., for Defendant.

SUPERIOR COURT, QUEBEC.

3RD SEPTEMBER, 1878.

Coram CARON, J.REGINA *ex relatione* O'FARRELL vs. GARNEAU *et al.*

PROHIBITION—EXCEPTION TO THE FORM.

HELD:—1° That a writ of summons in the nature of a writ of Prohibition cannot be quashed on motion.

2° That a special answer may be filed to an exception to the form.

As to the first point the court cited *Macfarlane v. Worrall*, 4 L. C. R. 97. As to the second, *Clarke et al v. Clarke et ux.* 1 L. C. J. 99 ; *Beacon Assce Co v. Whyddon*, 1 L. C. J., 178.

O'Farrell, for Plaintiff.

Alleyn, Q. C., and *Hearn, Q. C.*, for Defendants.

CIRCUIT COURT—EJECTMENT.

QUEBEC, 3RD SEPTEMBER 1878.

Coram CARON, J.

SCHOOL COMMISSIONERS ST. DAVID vs. DEVARENNES.

The defendant was employed as a school teacher by Plaintiffs, with the privilege of occupying the school house as her residence. Her engagement having been declared at an end by a resolution of the Plaintiffs, she persisted against their will in occupying the school house.

HELD:—That an action to eject her, under art. 887 C. C. P., could not be maintained for want of jurisdiction, there being no lease and no occupation with the consent of the proprietors of the premises.

The action was brought in ejectment, and was dismissed on a declinatory exception.

Amyot & Casgrain, for Plaintiffs.

MacKay & Twrcotte, for Defendant.

COUR DU BANC DE LA REINE—EN APPEL.

QUÉBEC, 3 SEPTEMBRE 1878.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

O'FARRELL ET DOUCET.

JUGE :—Que suivant la procédure actuelle en matière de prohibition, il est loisible au juge dont le jugement est attaqué, de comparaître sur l'assignation à lui faite dans la cause.

La Cour, etc. "Considérant que le juge des Sessions de la Paix avait le droit de comparaître sur l'assignation qui lui a été donnée en cette cause, et que la motion de l'appelant pour faire rejeter cette comparution était mal fondée, et que, quant aux procédures subséquentes qui n'étaient mentionnées dans la motion que d'une manière générale, l'appelant ne souffre aucun préjudice en autant que l'effet de la décision pourra être remédié par le jugement final, s'il y a lieu, la Cour rejette la pétition pour appeler."

O'Farrell, pour le Demandeur.

Allyn, Q. C., pour le Défendeur.

SUPERIOR COURT, QUEBEC.

7TH MAY, 1878.

Coram MEREDITH, C. J.HALE *et al.*, vs. PRICE *et al.*

HELD :—That, under the circumstances, disclosed by the Defendant's motion, the Court will compel non-resident Plaintiffs to give further security for costs, without staying the proceedings.

The motion of the defendants, supported by affidavit, is in these terms : "Inasmuch as the Plaintiffs in this cause are

Hale et al., “ non-resident foreigners, and as it will be necessary for the
Price et al., “ Plaintiffs to procure a commission for the examination of witnesses at Buenos-Ayres, in South America, which commission
 “ will entail a very large expenditure of money, and as the
 “ Plaintiffs have already given security in this cause, that they
 “ be ordered and adjudged to furnish additional security to the
 “ sum of six hundred dollars, currency, within such short delay
 “ as the court may fix, and further that all proceedings be
 “ stayed until such security be furnished.”

Per Curiam.—The Plaintiffs are ordered to give further security for costs to the extent of two hundred and eighty dollars, before the first day of next term,—proceedings not to be stayed in the meantime.

Bossé & Languedoc, for Plaintiffs.

Blanchet & Pentland, for Defendants.

SUPERIOR COURT, QUEBEC.

1877.

Coram STUART, J.

SIMARD v. THE CORPORATION OF THE COUNTY OF MONTMORENCY.

MUNICIPAL CODE—PROHIBITION.

HELD :—1. That no law stamps are required to be put upon proceedings before magistrates in civil matters.

2. That a county municipality can collect a tax imposed by itself not on a municipality but on certain individuals in whose interest it had opened a road which was a county road, and within its exclusive jurisdiction.

3. Taxes imposed by the county on local municipalities can be levied by such local municipalities only. Taxes ordered to be levied on taxable property belonging to persons interested or benefitted by any public work, are direct taxes by the county, to be levied by it only.

4. The validity of *procès-verbaux* and acts of apportionment cannot be tried incidentally, and they are conclusive and binding until set aside by direct proceedings such as furnished and authorized by the municipal code.

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5. As a general rule governing the remedy by prohibition, it must be resorted to between the commencement of the action complained of and final judgment; otherwise the want of jurisdiction must appear on the face of the proceedings in order to justify prohibition after judgment. If the rate payer have abstained from urging before the magistrate's court, his objections to the jurisdiction of the magistrate, or to the sufficiency of the municipal acts, such objections will not afterwards be listened to, if urged collaterally upon proceedings in prohibition.

Per Curiam.—A proceeding by prohibition has been taken by the plaintiff upon the judgment of a magistrate condemning him to pay a sum of money to the county.

The county of Montmorency, by *procès-verbal* duly made and homologated, ordered the opening and making of a road in the parish of St. Fereol at the cost of certain inhabitants of that parish for whose benefit the road was opened; subsequently an act of apportionment, in execution of the said *procès-verbal*, was by the council of the county, ordered to be made, and the secretary-treasurer of the parish of Saint Fereol was charged with making the same. This also was afterwards homologated by the county council after the due observance of the legal formalities. The secretary-treasurer of the parish of Saint Fereol was then employed by the county council to give the necessary notices of payment to all persons named in the act of apportionment and to receive payment of the same. All this was also done, and no objection was made to the *procès-verbal* or act of apportionment at any time during which, by law, it was competent to object to them. The plaintiff in the cause, after due notice to pay, made default, and proceedings were adopted before a magistrate in the name of the county, against him for the recovery of a sum of ten dollars and fifteen cents, amount for which he stands liable under the act of apportionment. The plaintiff appeared by attorney, pleaded a denial, and put the corporation under the obligation to prove its case, which it did to the satisfaction of the magistrate. The case of the corporation being closed, the plaintiff was asked if he had any evidence to adduce upon his defence, and upon his declaration that he had not, the case was considered and decided by the magistrate, condemning the plaintiff to pay

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the sum demanded. Execution in due time was issued upon this judgment, when the plaintiff resorted to the proceedings by prohibition.

Numerous reasons are alleged by him, of which by far the largest number go to the merits of the case as he views it, and are inadmissible to ground a prohibition ; the only grounds set up by the plaintiff which it is necessary to mention at all, are, that the magistrate had refused to hear the plaintiff and admit him to plead, that none of the proceedings before the magistrate were stamped as required by law, and were consequently null ; that the proceedings for the recovery of the sum due could only be taken by the municipality of St. Fereol, and not by the county municipality.

As to the first of these objections there is no foundation in fact for it, the proceedings before the magistrate establish the very reverse and there was no attempt made to controvert them. This ground was possibly urged to secure the granting of the prohibition *in limine*.

As to the second, no stamps are required to be put upon the proceedings before a magistrate in civil matters, such as the present, and no objection to the want of stamps was made in the progress of the proceedings, nor did the plaintiff himself stamp his proceedings there.

The remaining ground that the county municipality could not collect a tax imposed by itself, not on a municipality, but on certain individuals in whose interest it had opened a road, which was a county road, and within its exclusive jurisdiction, is a proposition of law grounded on articles in the municipal code, and which can be safely decided only by reference to them.

Art. 938 enacts. The amount of every tax imposed by a county council, for general or special purposes, is levied, except in the case mentioned in articles 490 and 491, on all the local corporations of such county, in proportion to the total value of their taxable property liable for the payment of such tax.

Art. 939. The portion imposed on each local corporation constitutes a debt payable by such corporation to the county council, according to the conditions and on the terms fixed by such council.

The amount of such portion or debt is levied in the local municipality, in the same manner as local taxes, on all the taxable property subject to such tax, without its being necessary to make other by-laws or orders for that purpose.

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There is nothing difficult in seizing the full meaning of these articles. The taxes imposed by the county council on the local corporations of such county, are debts payable by such local corporations to the county council, and are to be levied in the local municipalities in the same manner as local taxes, without it being necessary to make other by-laws or orders for the purpose.

A tax imposed by a county council, not upon any local municipality, but upon certain individuals, could under none of the known rules of interpretation of statutes be held to fall within the meaning of these two articles ; but as the municipal code is to be carried out by persons far from familiar with law, it was deemed proper to make assurance doubly sure, and to except from the operation of these articles, the case mentioned in articles 490 and 491 of the municipal code.

Let us now see the cases which are not regulated by the articles above mentioned.

Art. 490. *To levy by means of direct taxation on all the taxable property, or only on the taxable real estate belonging to those persons who, in the opinion of the county, are interested in any public work carried on under the control of the corporation, or belonging to those who benefit by such work, all sums of money required for the construction and maintenance of such work.*

Art. 401. *To levy by means of direct taxation, money required for any purpose, within the scope of the functions of the council, on all taxable property, or only on all taxable real estate comprised within a part of the municipality, on petition by the majority of the rate payers liable to pay such tax, to the extent and under the conditions set forth in such petition.*

The county council only exercises the power conferred by this article when the territory of the majority of the rate payers, by whom such petition was presented, is interested in two or

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more local municipalities of the county, or when the money to be raised and levied is to be employed on some public work which falls under its jurisdiction.

The power of the county municipality *to levy*, by means of direct taxation, *upon the persons interested in any public work and who benefit by it*, is thus unequivocally conferred upon the county municipality and is the case distinguished and excepted from the power conferred upon the county municipality, *to impose taxes* on the local municipalities, which last taxes can only be levied by such local municipalities themselves.

In brief, taxes, imposed by the county on local municipalities, can be levied by such local municipalities only.

Taxes ordered to be levied on taxable property belonging to persons interested or benefitted by any public work, is direct taxation by the county, to be levied by it only.

The tax to be levied on the plaintiff, of which he complains in the present cause, is a direct tax imposed upon him by the county for a road, in which he was interested and benefitted, and falls within the purview of the two last mentioned articles and not the two first.

The opening of the road in question by the county municipality, and taxing the persons directly for whose benefit it is made, is a legislative power, embodied in the procès verbal and act of apportionment upon which the proceedings before the magistrate rest. These important documents are binding until they have been annulled by the magistrate's Court or the Circuit Court, in the manner and within the delay prescribed by the articles 100, 461, 705, of the municipal code. No proceedings whatever have been adopted, by an interested party, under these several articles, to have the procès-verbal and act of apportionment, or either of them, annulled, and they were consequently binding on the magistrate, and are equally so upon this court: their legality cannot be impeached collaterally upon prohibition. The secretary-treasurer proved before the magistrate that more than the three months prescribed by the municipal code, had elapsed after the giving of the required notices in relation to these documents, before the proceedings were taken against the plaintiff, and that they were not called in question. I assume it

to be law that the validity of *procès-verbaux* and acts of apportionment cannot be tried incidentally, and that they are conclusive until set aside by direct proceedings, such as furnished and authorized by the code.

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The prohibition in this case was resorted to after judgment rendered by the magistrate, and after the plaintiff had acquiesced in his jurisdiction by appearing without challenging it, and pleading to the merits of the demand made upon him. As a general rule, governing the remedy by prohibition, it must be resorted to between the commencement of the action complained of and final judgment. Otherwise the want of jurisdiction must appear on the face of the proceedings in order to justify prohibition after judgment. Lord ABINGER C. B. observed in *Robert v. Humby* "the rule seems to be this, that if you wait and take the chance of a sentence in your favor, you cannot afterwards object to the jurisdiction, unless it appears on the face of the proceedings that the court had no jurisdiction." In *Buggin v. Bennet*, Lord MANSFIELD, drawing the distinction between cases wherein the parties have acquiesced in the jurisdiction of the court below, and those where the objection had been taken at the trial, says "If it appears upon the face of the proceedings that the court below has no jurisdiction, a prohibition may issue at any time, either before or after sentence ; because all is a nullity, it is *coram non judice*. But when it does not appear upon the face of the proceedings ; if the defendant will lie by, or suffer that court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain prohibition upon it, after all his acquiescence in the jurisdiction of the court below."

In the present case the plaintiff not only abstained from urging any objection to the jurisdiction of the magistrate, but he never attacked the *procès-verbal* or act of apportionment which the magistrate merely gave effect to. It would, in my opinion, be dealing a fatal blow to our municipal system, and it would be sanctioning an oppressive course of conduct in the rate payers, to absolve them from urging their objections to the jurisdiction of the court, or the validity of the municipal acts,

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in a direct frank manner, and to listen to such objections collaterally urged upon proceedings in prohibition. I take for my guidance the rule which obtains in England, and I am of opinion that the plaintiff has made out no case in prohibition, and that he must consequently fail.

Action dismissed.

Blanchet & Pentland, for Plaintiff.

Bossé & Languedoc, for Defendant.

The foregoing judgment was confirmed by the Court of Queen's Bench, appeal side, Quebec, 7th June, 1878. Present : Sir A. A. DORION, C. J., and judges MONK, RAMSAY, TESSIER & CROSS.

COURT OF QUEEN'S BENCH,—APPEAL SIDE.

QUEBEC, 4th MARCH 1878.

Coram DORION, C. J., MONK, J., TESSIER, J., CROSS, J.,

O'FARRELL and BRASSARD, *et al.*

Held:—That there is no appeal from the judgment of this court to Her Majesty in Her Privy Council, in a matter of Prohibition.

Appeal refused.

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SUPERIOR COURT, QUEBEC.

9th JULY, 1878.

No. 2087.

Coram CASAULT, J.

THE CANADA PAPER CO *et al.*, vs. CARY.

HELD:—That a judge *in banco* cannot revise and annul a judgment in chambers, granting possession to plaintiffs, on giving security, of goods revendicated, such judgment in chambers having by law the force of a judgment of the court.

Andrews, Caron & Andrews, for plaintiffs.

Dechéne, for defendant.

SUPERIOR COURT, QUEBEC.

9th JULY 1878.

Coram CASAULT, J.

SCOTT vs. HARDY *et vir.*,

ARTICLE 49 C. C. P.—EXCEPTION TO THE FORM.

The plaintiff was described in the lease on which the action was based as "Henry S. Scott," without any indication of the name for which the "S" stood;

HELD:—On exception to the form, that he could maintain an action in the name specified in the lease, without any further designation of his second christian name.

Exception to the form dismissed.

Robertson, for plaintiff.

Dechéne, for defendant.

SUPERIOR COURT, QUEBEC.

1876.

Coram STUART, J.,

Exparte THE COMMISSIONERS OF THE QUEBEC,
MONTREAL, OTTAWA AND OCCIDENTAL RAILWAY vs.
O'NEIL and Others.

RAILWAY ACT OF 1869—EXPROPRIATION—RAILWAY
COMMISSIONERS.

Held:—1^o That petitions for expropriation under the Railway act of 1869, must contain the description required by art. 2167, C. C.

2^o That the Commissioners of the Quebec, Montreal, Ottawa and Occidental Railway Company cannot in their own name exercise the right of action. The Railway being a public work, this right is vested in Her Majesty.

Per curiam.—These several petitions are alike in form and purpose, so that they present one question for decision. They are resisted on the following grounds :

1^o That the land desired in each case is not sufficiently or legally described.

2^o That the land is already in the possession of the Railway and there has been no satisfaction of any kind.

3^o That the Commissioners are without any authority to make the Petition in their name.

The 11th sec. of 32 Vic. ch. 51, requires that a notice should be served on the parties.

1^o Containing a description of the land *to be taken*.

2^o A declaration of readiness to pay.

3^o The name of the person to be appointed as arbitrator of the company.

Sec. 15. " If within 10 days after service of such notice or " within a month after publication thereof, the opposant party

“ does not notify to the *company* his acceptance of the sum offered,
 “ or notify to them the name of a person he appoints as arbitrator,
 “ then the judge shall, on application of the company, appoint a
 “ sworn surveyor sole arbitrator, for determining the compen-
 “ sation to be paid as aforesaid.

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“ If the opposite party notifies to the company the name of an
 “ arbitrator, the two arbitrators are jointly to appoint a third, or
 “ if they cannot agree upon a third, then the commissioner of
 “ agriculture and public works shall appoint one of the official
 “ arbitrators to be a third arbitrator. The award of the arbi-
 “ trators or any two of them is *final and conclusive*.”

Sec. 27 enacts “ upon *payment or legal tender* of the compensa-
 “ tion so awarded or agreed upon to the party entitled to receive
 “ the same, or upon deposit of the amount of such compensation
 “ in the manner hereinafter mentioned, the *award or agreement*
 “ *shall vest in the company the power forthwith to take possession of the*
 “ *lands or to exercise the right or to do the thing for which such*
 “ *compensation has been awarded or agreed upon.*”

This is the law, the payment or tender (in these instances by the Government of the Province) of the compensation awarded or agreed upon, vests the right to possession. This is the law of the land as found in Article 407 of civil code. “ No one can be compelled to give up his property *except for public utility*, and in consideration of a *just indemnity previously paid*.” If, after such payment or tender of the compensation, any resistance or forcible opposition be made to taking possession, the judge may, on proof to his satisfaction of such award or agreement, issue his warrant to the sheriff of the District, or to a bailiff as he may deem most suitable, to put the company in possession, and to put down resistance or opposition. So far we have the general rule that the payment or tender of the compensation awarded or agreed upon *gives possession*, and the sheriff puts down resistance or forcible opposition.

“ Sec. 28, enacts :—Such warrant may also be granted by any
 “ such judge, without such award or agreement, on affidavit to
 “ his satisfaction that the immediate possession of the lands or
 “ of the power to do the thing mentioned in the notice is neces-
 “ sary to carry on some part of the Railway with which the

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" company are ready forthwith to proceed: and upon the
" company giving security to his satisfaction, and in a sum
" which shall not be less than double the amount mentioned
" in the notice, to pay or deposit the compensation to be
" awarded, within one month after the making of the award,
" with interest from the time at which possession is given,
" and with such costs as may be lawfully payable by the com-
" pany."

This is an exception to the general rule established in the previous section, and to entitle the government to a warrant from the judge, there must be made out in the most satisfactory manner two things: that there has been resistance or forcible opposition to the taking possession, and that there is a necessity for the immediate possession of the lands. I should strongly incline to the opinion, that in a railway such as the one in question which has been under contract for years, it would be necessary to show some reason why the course prescribed by the 27th sec. had not been pursued earlier, and that this omission was not that of interest or design; for it must be borne in mind that it is a departure from a fundamental principle of law and public justice to compel any one to give up his property, even for public utility, without having first received payment of the indemnity to which he is entitled. In the present case the applications rest on the affidavit of the same individual couched in the general terms of the law, without a single fact stated from which the judge could decide whether there exists any necessity for immediate possession, nor what is the nature of the resistance or forcible opposition to overcome, if any at all ever existed. An affidavit produced by the parties shewing cause establishes that the lands have been in the possession of the company for a long time past, and that no opposition was made to its taking possession. The petitioners have not shown that they have met with any opposition, and there is not a shadow of reason for the intervention of any judge in the matter.

The parties further urge that they have named their arbitrator, but that the arbitrator of the government refused to join in the nomination of a third, as required by law, assigning as his reason that he desired the third arbitrator to be named by the Commissioner of public works. This reading of the law would give the government the nomination of two arbitrators out of

three, and as the award of any two is final and conclusive, I fear that such a course, even if it were consonant with the strict letter of the law, would stamp the impression on the public mind that the act of the government is rather that of appropriation of the land of individuals than that of acquiring it by expropriation in the sense of the law.

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The Petitions are in the name of the Commissioners of the Quebec, Montreal, Ottawa and Occidental Railway whose powers are defined by 39 Vic. ch. 2. That railway is now a public work belonging to the province of Quebec, and all the property and rights of action of the corporation of the North Shore Railway Company and all franchises and privileges thereof, are vested in Her Majesty to and for the uses of the Province: if lands are to be taken possession of, it must be for and in the name of Her Majesty by the Attorney General. I know of no other manner in which Her Majesty can call Her court into action; it cannot be seriously contended that the Commissioners represent Her Majesty and may in their own name exercise rights vested in Her. The construction and management of the Railway is confided to the Commissioners, but no right of property or action vests in them. I am of opinion that the objections urged against these petitions are well founded and are fatal to them and they are consequently dismissed with costs.

32 Vic. ch. 51, sec. 9, ss. 11, 12, 27, 28.

C. C. art. 2167. § 3, art. 407.

34. Vic. ch. 2. sec. 2, 3, 6, sec. 11. ss. 4.

J. G. Colston, Q. C., for Commissioners.

Ross & Stuart, for parties interested.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

QUEBEC, 8TH SEPTEMBER, 1874.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J.,
SANBORN, J.

REGINA v. PITRE CHOUINARD.

Indictment under 32 and 33 Victoria, ch. 21, section 78, which is as follows :

" Whosoever, *being intrusted*, either solely or jointly with any other person, with
" any *power of attorney for the sale or transfer* of any property, fraudulently sells or trans-
" fers, or otherwise converts the same or any part thereof to his own use or benefit, or
" to the use or benefit of any person other than the person by whom he was so intrusted,
" is guilty of a misdemeanor, and shall be liable to any of the punishments which the
" Court may award as hereinbefore last mentioned."

Held : That the *Power of Attorney*, mentioned in section 78, of 32 and 33 Victoria, chapter 21, must be a *WRITTEN Power of Attorney*, and oral testimony of a verbal Power of Attorney will not bring the Defendant's act within the scope of that statute.

This was a case reserved from the Queen's Bench, Crown Side, sitting in the district of Chicoutimi.

The whole case is resumed in the statement of objections filed in writing by the defendant's counsel, the case reserved submitted by the Honorable Judge ROUTHIER, and the judgment of the Court of Queen's Bench.

Objections of defendant's counsel.

1° That there is no valid indictment against the defendant in this cause, the only charge against him being contained in a document written and composed exclusively in the French language, a language prohibited from being used in indictments in the courts of this country by the laws in force therein.

2° That, in the said invalid document purporting to be the indictment herein, there is no *presentment* by the jurors for Our Sovereign Lady, the Queen, because the French word "*declarent*" used therein is not the equivalent of the English and sacramental word "*present*," and because the said invalid document does not shew that any *presentment* has been made "FOR" Our Sovereign

Lady, the Queen, and that this prosecution has been taken in her name, the only name in which it could have been taken, the words of the pretended indictment being : " Les jurés DE notre " Souveraine Dame, la Reine, DÉCLARENT." Regina
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3° That the said pretended indictment, purporting to have been framed under section 78 of chapter 21 of the Statutes of Canada, 32 and 33 Victoria, does not charge any offence created by that, or any other, statute, though it concludes "*contrà formam statuti*," and does not charge any offence cognizable in Law.

All which objections, taken by the said defendant, at the trial herein, the said defendant respectfully requested the said Honorable Judge to reserve for the consideration, as a reserved case, of the Court of Queen's Bench, (appeal side) at its then next sitting at Quebec.

RESERVED CASE.

Le défendeur en cette cause a, le quinze juillet dernier (1874), à Chicoutimi, subi son procès devant la Cour du Banc de la Reine, ayant juridiction criminelle, alors tenu et présidée par moi, pour avoir frauduleusement échangé et converti à son propre usage et bénéfice une jument qui lui avait été confiée avec procuration de l'échanger pour l'usage et bénéfice de Jean Baptiste Fortier, son mandant.

Il a plaidé *non-coupeable* à cette accusation ; et son conseil, après la clôture de la preuve de la Couronne, a prétendu que l'indictement était défectueux et demandé l'acquittement de l'accusé, pour les raisons mentionnées dans l'écrit ci-joint alors produit, et auquel je réfère cette Cour.

La première objection faite à l'indictement parcequ'il est en langue Française m'a paru ne pouvoir tenir en face de la section 133 de " l'Acte de l'Amérique Britannique du Nord, 1867."

La seconde objection alléguant que les mots " les jurés de Notre Souveraine Dame, la Reine, déclarent "..... ne sont pas une traduction fidèle des mots *sacramentels* : The jurors for our " Lady the Queen, present "..... m'a paru aussi futile, parceque c'est la traduction même de nos statuts Français, parceque le mot " *déclarent* " expriment mieux, suivant moi, que le mot *représentent*, le

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sens juridique du mot anglais "*present*," et parcequ'enfin Archbold, page 25, édition de 1871, cite comme ayant été déclaré valide un indictement commençant comme suit : "The Jurors of Our Lady, the Queen."

La troisième objection *seule* m'a paru sérieuse, quoique je l'aie jugée *non fondée*.

L'indictement est fondée sur la section 78 de la 32 et 33 Vict., chap. 21. La prétention de la défense est—1° que la procuration mentionnée dans cette section doit être *par écrit*, tandis que, dans la présente cause, la procuration prouvée était *verbale* ;—2° qu'il faut que le mandataire ou procureur ait *vendu* et non pas *échangé* la chose ou *propriété* qui lui a été confiée.

Dans la présente cause, il a été établi, 1° que J. Bte. Fortier avait confié à l'accusé une jument valant \$80.00, et l'avait autorisé et chargé *verbalement*, moyennant un salaire ou prix convenu de \$2.00—de l'échanger pour un cheval alors convenu et désigné entr'eux.—2° que l'accusé avait échangé la dite jument comme a lui appartenant, pour un autre cheval que celui désigné et convenu, et s'était approprié le dit cheval qu'il avait refusé de rendre au dit J. Bte. Fortier.

Ces faits étant prouvés, j'ai cru, 1° que la procuration *verbale* devait suffire, et que ce n'était pas l'écrit qui pouvait constituer le crime ; que, si le législateur avait voulu que cette procuration fut *écrite*, il l'aurait expressément déclaré, comme il l'a fait dans la section 76 du même acte. 2° que le fait de l'accusé d'avoir *échangé* la jument, à lui confiée, contrairement aux instructions données, et d'avoir frauduleusement converti le produit de cet échange à son *propre usage et bénéfice*, se trouvait suffisamment d'accord avec la section 78 citée, et *légalement* exprimé par les mots *vend*, ou *transporte* ou *autrement convertit frauduleusement*, &c., du statut.

C'est pourquoi j'ai ordonné au défendeur de passer outre et de procéder. Néanmoins comme la troisième objection me paraissait sérieuse, j'ai cru devoir accorder ce qui m'était demandé par l'écrit ci-joint, et réserver pour la considération de cette Cour les trois objections soumises.

Les petits jurés ont rapporté contre l'accusé un verdict de

coupable, et il a fourni caution de comparaître au prochain terme criminel à Chicoutimi pour recevoir le jugement de cette Cour. Regina
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Je soumetts en conséquence à la décision de cette Cour les trois objections ci-dessus mentionnées, et je la prie de déclarer si j'ai eu raison ou tort de renvoyer les dites objections comme non fondées.

Ce 26 août 1874.

(Signé), A. B. ROUTHIER,
J. C S.

JUDGMENT.

La Cour, ayant entendu l'accusé, Pitre Chouinard, par son avocat, ainsi que la Couronne, sur les questions réservées par le Juge président au procès contre le dit Pitre Chouinard devant la Cour du Banc de la Reine, à Chicoutimi, pour avoir frauduleusement échangé et converti à son propre usage et bénéfice une jument qui lui avait été confiée par procuration verbale de l'échanger contre un autre cheval désigné et convenu pour l'usage et bénéfice de Jean Baptiste Fortier, son mandant.

Considérant sur la première question réservée que la langue Anglaise et la langue Française étant toutes deux reconnues par "l'Acte de l'Amérique Britannique du Nord," de mil huit cent soixante-sept, comme langues officielles, l'objection faite à l'acte d'accusation (indictment) parce qu'il est rédigé en langue Française est mal fondée.

Considérant sur la seconde question réservée que l'objection fondée sur ce que les jurés, au lieu de se servir des termes :

"*The jurors FOR Our Sovereign Lady, the Queen, PRESENT, &c.,*" ont fait usage des expressions suivantes :

"*Les jurés DE Notre Souveraine Dame, la Reine, DÉCLARENT,*" est également *mal-fondée*.

Et considérant sur la troisième question réservée sur l'objection faite que l'acte d'accusation, basé sur la clause 78 de l'acte passé sous le chapitre 27 dans la session qui a eu lieu dans les 32^e et 33^e années du Règne de Sa Majesté, ne mentionne pas

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qu'une procuration par écrit ait été donnée à l'accusé par le dit Jean Baptiste Fortier, et que le juge président au procès a permis de prouver que la procuration mentionnée dans cette section pouvait être verbale et pouvait être établie par preuve testimoniale.

Et considérant que le terme *procuration* dans la version française et ceux de "*power of attorney*," dans la version anglaise ne peuvent d'après l'intention et le sens s'appliquer qu'à une procuration par écrit, et qu'en conséquence l'acte d'accusation (*Indictment*) est irrégulier, insuffisant et nul, et la preuve permise d'une procuration verbale est également irrégulière et illégale, cette Cour déclare et adjuge que le dit acte d'accusation (*Indictment*) contre le dit Pitre Chouinard est irrégulier, insuffisant et nul, et la preuve permise d'une procuration verbale est également irrégulière, illégale et nulle, et casse et annule (quash) la conviction ou verdict de culpabilité rapportée par le juré contre le dit Pitre Chouinard devant la dite Cour du Banc de la Reine, dans le district de Chicoutimi, le quinze juillet mil huit cent soixante-et-quatorze.

Ernest Cimon, pour la Couronne.

John O'Farrell, pour le Défendeur.

SUPERIOR COURT, QUEBEC.

9:h JULY 1878.

Coram CASAULT, J.

FRASER vs. GARANT.

OPPOSANT—MOTION FOR FOLLE ENCHÈRE.

An adjudicataire of immoveables having failed to pay the price, one Bertrand produced on opposition *afin de conserver* and moved for a *folle enchère*. Bertrand's claim did not appear in the Registrar's certificate, and he had given notice of his motion *before filing* his opposition. *He'd*, that as his claim was not proved in the Record at the time he gave notice, his motion must be rejected with costs.

Hamel & Tessier, for Plaintiff.

Alleyn & Chauveau, for Bertrand.

SUPERIOR COURT, QUEBEC.

1878.

Coram McCORD, J.

PLANTE v. ROBITAILLE.

RENT—SAISIE GAGERIE—INSOLVENCY.

The defendant, as one of a commercial firm, having made an assignment in Insolvency, the Plaintiff took an attachment against him individually for rent due and to become due. The defendant demurred, on the ground that the rent had not previously been demanded, and that no right was shown to claim rent not yet due.

Held :—That neither of these grounds would support the demurrer, in view of Plaintiff's allegation that Defendant, as a member of the said firm, had made an assignment in Insolvency.

Per curiam.—The plaintiff sues the defendant for \$100 and interest, and the action is accompanied with a saisie-gagerie, \$41.66 being for rent due, and the remainder for rent to become due.

The action is demurred to, on grounds which ultimately amount to these, that the rent was not previously demanded, and that no right is shown to claim the rent not yet due.

I consider neither of these grounds good in the face of the plaintiff's allegation that the defendant as a member of the firm of Pouliot & Robitaille, had made an assignment to an Official Assignee under the Insolvent Act of 1875.

The insolvency vested the individual property of the defendant in the assignee and even if it did not give the plaintiff a right to claim the rent not yet due it gave him the right of using conservatory process by means of *saisie-gagerie* against the defendant personally and so far his right of action exists.

Whether he can obtain payment of *all* the rent he asks for, is a matter to be decided on the merits.

Demurrer over-ruled.

Drutin & Lapointe, for Plaintiff.

Garon, for Defendant.

COUR SUPÉRIEURE, QUÉBEC

No. 2098.

Coram CARON, J.OMALLEY vs. THE SCOTTISH COMMERCIAL INSURANCE
COMPANY.

EXCEPTION DÉCLINATOIRE—JURISDICTION—ASSURANCE.

Une compagnie d'assurance ayant son domicile à Montréal, et émanant ses polices de Montréal, prend des risques à Québec par l'entremise de son agent résidant en ce dernier endroit.

JUGÉ :—Que la compagnie peut être poursuivie à Québec, le droit d'action y ayant pris naissance.

Action prise par le demandeur pour recouvrer la somme de deux mille piastres, montant d'une police d'assurance contre le feu, à Québec, au bureau de l'agent de la compagnie. La défenderesse plaide par exception déclinatoire les moyens suivants :

First.—Because the *demande* in this cause is purely personal and is not a matter mentioned in articles thirty five, thirty six, thirty eight, forty, or forty two of the code of civil procedure of this province.

Second.—Because the said defendants have not been summoned to appear before the Court of their domicile, their domicile and chief place of business for this province being in the city of Montreal, in the district of Montreal.

Third.—Because they have not been served within this district of Quebec with the process of this Court, and it is not alleged or pretended that any such service has been made.

Fourth —Because the pretended right of action in this cause did not originate within this district of Quebec, the policy of insurance whereon this action is founded having been made and dated and entered into, as appears, by said policy fyled by the plaintiff, not in this district, but at the said city of Montreal, in the district of Montreal.

Fifth.—Because the whole cause of action, if any the plain-

tiff has, in this matter, did not originate in the district of Quebec and the defendants have not been served with the process of this Honorable Court in this district, nor are they domiciled therein.

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Autorités citées par la défenderesse.

12 L. C. R. p. 416, Jackson *et al.*, vs. Coxworthy.

1 Q. L. R. p. 61, Wurtele vs. Lenghan *et al.*

1 Q. L. R. p. 204, Connolly vs. Brannan.

13 L. C. J. p. 16, Gault *et al.*, vs. Wright *et al.*

1 Q. L. R. p. 207, Vézina vs. The New-York Life Insurance Company.

JUGEMENT.

La Cour, etc. "Considérant qu'il est allégué dans la déclaration du demandeur et qu'il est en preuve au dossier que la police d'assurance sur laquelle la présente action est basée, quoique datée à Montréal, a été remise au demandeur à Québec par l'agent de la défenderesse en vertu de conventions précédemment faites à Québec, au bureau de la dite défenderesse par son dit agent, et qu'en conséquence le droit d'action a pris naissance à Québec, et vu que le montant dû en vertu de la dite police est payable à Québec, renvoie la dite exception déclinatoire avec dépens."

Ce jugement a été confirmé en appel.

Alley & Chauveau, pour le Demandeur.

Andrews, Caron & Andrews, pour la Défenderesse.

SUPERIOR COURT, QUEBEC.

1878.

Coram McCORD, J.

MORIN v. MORIN.

HELD :—That an instrument under private seal, *sous seing privé*, need not be executed in duplicate.

Per curiam.—This case comes up upon the petition of one Bedard, an opposant creditor, for *folle enchère* against one Moreau, the *adjudicataire*.

Moreau pleads to this petition a written agreement by which Bedard agreed, in the event of Moreau's becoming purchaser, to grant him the same delay for payment by instalment which he had already given to the defendant upon whom the property was being sold.

He further tenders and pays into Court the instalment of \$200 and interest then due according to the terms mentioned in said agreement.

Bédard answers specially :

1. The nullity of the agreement, as being a *sous seing privé* not executed *en double* ;
2. That Moreau had misrepresented to him that another document, delivered to him, Bédard, as a duplicate, was not one in fact.

The case of *Lampson v. McConnell*, 14 L. C. R. page 44,—and the omission in our civil code of the provisions contained in article 1325 of the french code, settle, as against the petitioner's pretensions, the question as to whether a *sous seing privé* need be executed *en double*, especially in a case like the present where the party against whom it is invoked has expressly admitted it.

The private writing filed by the *adjudicataire* therefore stands good, and fully sustains his contestation of the petition. It will in consequence be maintained, and the petition rejected with costs.

Contestation maintained.

Amyot, for Petitioner.

Sewell, Gibsons & Aylwin, for *adjudicataire*.

SUPERIOR COURT, QUEBEC.

11TH MAY 1878.

Coram McCORD, J.SANSCHAGRIN *v.* SAUVAGEAU, & GERMAIN, Opposant.

A contestation of an opposition for payment on the ground that the same was founded on a constituted rent more than 30 years old, without interruption of prescription being alleged, *Held*, bad, on demurrer, because as regards long prescriptions, under article 2188 C. C., they must be pleaded to be taken advantage of, and the opposant was not bound to allege interruption of prescription until that prescription was pleaded to his opposition.

Per curiam.—By the report of distribution in this case one Germain is collocated for \$65, for arrears of a constituted ground rent with which one of the properties sold in this cause was charged ; and Paré, another creditor, has filed a contestation of this collocation on the ground that Germain's opposition upon which his collocation is based shews that his title to the constituted rent is more than 30 years old, and does not shew that there has been interruption of prescription. To this contestation Germain has demurred.

I consider the ground of contestation urged by Paré bad in law, because as regards long prescriptions they must, under article 2188, be pleaded to be taken advantage of, and the opposant Germain was therefore not bound to allege interruption of prescription until that prescription was pleaded to his opposition. I shall therefore maintain the demurrer with costs.

Demurrer maintained.

Montambault, Q. C., for Germain.*Langelier & Langelier* for Paré.

SUPERIOR COURT, QUEBEC.

MARCH, 1878.

Coram McCORD, J.

PAQUET v. CITIZENS INSCE. CO.

Action for \$800. amount of a fire policy. Plea, that the property insured was, after the issue of the policy, sold for taxes under the municipal code, and the ownership having become vested in the purchaser, the insured had lost all insurable interest therein. Special answer, that the municipal sale never finally divested the insured of the ownership, that before the fire he had, under the provisions of the municipal code, redeemed his property, and had never ceased to have an insurable interest in it.

HELD :—That the sale of the property for municipal taxes under the municipal code, followed as it was by the redemption of the property in accordance with the said code, was not such an alienation as would avoid the policy, either under the conditions endorsed upon it, or under the provisions of article 2576 of the civil code.

Per curiam.—Action for \$800. amount of a fire policy. Plea that one of the conditions of the policy was that the insurance would be void in the event of a sale, transfer or change of title of the property, and that art. 2576 of the civil code declares that an insurance is rendered void by transfer of interest in the object of it, unless with the consent of the insurers.

That the property insured was after the issue of the policy sold for taxes under the municipal code and bought and paid for by la Banque Nationale.

That consequently the ownership became vested in la Banque Nationale.

The defendants further allege the want of sufficient notice of the loss by fire, or of any proper account thereof, the failure to give information under oath as to insurance with other companies, or as to the origin of the fire, and the absence of any declaration containing a copy of the description of the property and its situation.

The plaintiff by special answer says that the municipal sale never finally divested him of the ownership so as to bring him under art. 2576 C. C., that before the fire he, under the provisions

of the code, redeemed his property, and that he never ceased to have an insurable interest in it.

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From the evidence adduced in this case and the argument of counsel at the hearing on the merits, I find that the only question to be decided is this :

Was the sale of the property for municipal taxes under the municipal code, followed as it was by the redemption of the said property by the plaintiff in accordance with the said code, such an alienation as would render the policy void either under the conditions endorsed on the policy or under the provisions of article 2576 of the civil code.

The defendants invoke two of the conditions of the policy as having been violated by the municipal sale above mentioned 1° Condition No. 2 which says : " When property has been sold *and delivered*, or otherwise *disposed of*, so that ALL interest or liability on the part of the assured herein named has *ceased*," the insurance shall terminate. 2° Condition No. 4 which says : " in case of any sale, transfer or change of title in the property insured," the insurance shall be void.

I take it that these two conditions, as expressive of the terms of one contract between the parties plaintiff and defendant, must be construed as interpretative the one of the other and that condition 4 is necessarily limited by condition 2, otherwise condition 2 would be quite useless, because under condition 4, (if construed literally and supposing the law would allow such a construction), the mere "*change of title*," would void the policy, whether the interest of the insured had ceased or not.

I am therefore of opinion that even under the terms of the policy the insured would not forfeit his insurance by a change of title, unless by that change he had lost his interest in the property, and (as the terms of the condition say) *all his interest*.

But even if condition no 2 did not form part of the policy, I think that its restrictive terms would still be implied from the nature of the contract itself, for it cannot be supposed that in any case of insurance the insured without apparent reason or consideration intends to consent to the forfeiture of his policy,

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so long as he continues to have an insurable interest in the property. Such seems also to be the interpretation of the contract, upon which article 2576 is based, for it speaks not of the transfer of the property, but of transfer of interest in it.

The above reasoning would apply even to the case of a voluntary sale with right of redemption, for a price equal to the value of the property, but it applies with still more certainty and force to a compulsory sale which is only conditional and incomplete and where the payment of about 30 dollars, only, is necessary to redeem property worth about \$1100.

It is clear that the plaintiff did not lose his interest in the property and that therefore art. 2576 does not apply ; it is also clear, to my mind at least, that the words "sale, transfer or change of title," in condition 4 of the policy, must be interpreted as meaning such a sale, transfer or change of title as would divest the insured of his interest, and this independently of the terms of condition 2, which refers to a disposal of all the interest of the insured.

The learned counsel for the defendants has relied upon article 1553 of the civil code, which states that the buyer of a thing subject to a right of redemption holds all the rights which the seller had in the thing, but it is evident nevertheless that as against the seller he only holds them precariously, conditionally, and perhaps as in this case only temporarily, (a little over a month in the present instance), and this is not I take it the kind of "sale, transfer or change of title" which the parties could have had in view when they entered into their contract of insurance.

Then again, as regards the forced sale for taxes which takes place under the municipal code, is it really the sale with right of redemption known to our old french law and to which our civil code refers in the articles above mentioned ?

I am of opinion that it is not, and that although the municipal code calls the adjudication a sale, the provisions of the code are such as to prevent its being one in reality until the two years have expired and certain conditions and formalities have been complied with.

In the first place the right of redemption in these so called sales is not one which the vendor has against the purchaser ; it is a right of the owner to get back his property by paying, not to the purchaser, but to the municipality a certain sum of money and this right of redemption may be exercised by any person in behalf of the owner even without his authority. The sale in fact even when it does take place, after the lapse of 2 years, is from the corporation and not from the owner and is not therefore the ordinary sale with right of redemption as between buyer and seller.

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That the sale is not complete even as between the corporation and the purchaser may be inferred from art. 1004 which prevents the latter from taking wood off the property during the first year, from article 1006 which requires notice of the adjudication to be given to the owners, from art. 1008 which makes the payment of subsequent taxes a *sine quâ non* to enable the purchaser to obtain his title, and from the terms of art. 1013 which evidently can only refer to the sale as completed after the two years and which says therefore that it is *that* sale which conveys ownership and not the mere adjudication.

To resume then, I am of opinion that by the mere adjudication of the property for municipal taxes the plaintiff did not lose his ownership, that even if he did he did not lose his insurable interest, and that under the conditions of the policy, as well as by law, he could not have forfeited his claim under the policy without having lost his interest in the property.

The following authorities may be referred to : Phillips on insurance, vol. 1, p. 477, No. 880, with reference to the condition that the policy is to be void on the sale, or transfer or alienation of the subject, says : " Where a sale was made but " was avoided for non-payment of the purchase money it was " held that the risk was merely suspended until such reversion."

Parsons on Mercantile Law p. 532, says : " Nothing is properly an alienation of the property which is *less than an absolute conveyance* of the title thereto..... A contract to convey is not " an alienation. Nor is a conditional sale where the condition is " precedent and is not yet performed. Nor is a mortgage, not " even after breach, and perhaps entry for breach, and not until foreclosure. *Nor selling and immediately taking back.*"

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Clarke on Insurance, p. 194. "The levy of an execution on
"the premises will not avoid such a policy as being an aliena-
"tion, for until the expiration of the time for redemption the
"insured still retains an interest in the premises. In such case
"the constructive possession of the sheriff will not prevail over
"the actual possession by the insured."

See as to the extent to which the *vente à reméré* is an aliena-
tion under the French law, 7 Deurante continué par Cohuet de
Santerre. Ed. 1873, p. 140, 141 :

Certes au point de vue de la propriété, l'acheteur n'est pas
l'auteur du vendeur. Nous l'avons plusieurs fois répété, le ven-
deur reprend la chose *proprio jure* ; le droit de l'acheteur étant
résolu, le vendeur n'est pas l'ayant cause de l'acheteur, et notam-
ment il ne subit pas dans sa propriété les conséquences des actes
de disposition faits par l'acheteur. Le droit du vendeur est la
négarion du droit de l'acheteur, loin d'en être la conséquence.
Mais s'il en est ainsi au point de vue de la *propriété*, il faut recon-
naître que par rapport à la possession il en est autrement.

Judgment for Plaintiff.

Rémillard & Flynn, for Plaintiff.

Holt, Irvine & Pemberton, for Defendant.

QUEEN'S BENCH—APPEAL SIDE.

QUEBEC, 6TH MARCH, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J.,
TESSIER, J.

MONTIZAMBERT & DUMONTIER.

HELD :—That the provisions of chapter 37 of the C. S. L. C. sections 74, 75 and 76,
relating to the deposit by Registrars of the Official Plans and Books of Refe-
rence for each Registration Division, have been abrogated, in virtue of article
2613 of the civil code, by the express provisions on the same subject contained
in articles 2168, 2169, 2170 and 2171 of the same code.

That a Registrar cannot be condemned to pay the fine imposed by C. S. L. C chap. 37, section 76, for a failure to keep from day to day the index required by article 2171 of the civil code.

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Dumontier.

This was an appeal from judgment of the Superior Court, Quebec, rendered the 8th September, 1875, as reported at page 218 of the first volume of the Quebec Law Reports.

On the 22nd July, 1874, the respondent, prosecuting *qui tam*, instituted an action against the appellant, who is the registrar of the county of Quebec, to recover the sum of \$100, as a penalty for an alleged disobedience to the requirements of the law.

The declaration alleges, that official plans and books of reference for St. Roch's ward, in the city of Quebec, (comprised in the registration division of Quebec), had been deposited in the registry office of the registration division of Quebec, in conformity with article 2166 of the civil code since the 3rd September, 1870. That a proclamation of the Lieutenant-Governor in Council was issued, dated 3rd September, 1870, and published in the Official Gazette on the same day, giving notice in accordance with article 2169 of the civil code, that the above mentioned plans and books of reference for St. Roch's ward, had been deposited in accordance with the requirements of article 2168 of the code, and would come into force on the 1st October following. The declaration then goes on as follows :

“ Qu'à dater de l'époque fixée dans la dite proclamation, savoir, du premier octobre mil huit cent soixante-dix, le dit défendeur, en sa qualité de Régistrateur de la circonscription d'enregistrement de Québec, était tenu par la loi de faire l'index des immeubles du dit quartier St. Roch, et de le continuer jour par jour en inscrivant, sous chaque numéro de lot indiqué séparément aux dits plans et livres de renvois, un renvoi à chaque entrée faite subséquemment dans les autres livres et registres affectant tel lot, de manière à mettre toute personne en état de constater facilement toutes les entrées faites subséquemment concernant ce lot ; et que pour aucune désobéissance ou négligence de se conformer à la dite loi et de remplir la dite obligation de faire le dit index des dits immeubles, le dit défendeur encourt une amende de cent piastres ; que de fait le dit défendeur n'a pas même encore commencé l'index des immeubles pour le dit quartier St. Roch, de la cité de Québec, tel que prescrit à lui par

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la section soixante-seize du chapitre trente-sept des Statuts Refondus du Bas-Canada ; qu'il refuse et néglige encore de remplir la dite obligation, au grand dommage du public, et qu'il a ainsi encouru une amende de cent piastres, que le dit demandeur a droit de réclamer de lui en justice, tant pour lui qu'au nom de Notre Souveraine Dame la Reine." The declaration then concludes for the penalty of one hundred dollars ; one half to be paid to the informer, and the other to the Crown.

The appellant pleaded the general issue, and evidence having been given to shew the nature of the index kept at the registry office at Quebec, the Court, on the 8th September, 1875, pronounced the following judgment :

" La Cour ayant examiné la procédure et la preuve de record et entendu les parties par leurs avocats respectifs finalement au mérite ;

" Considérant que le défendeur était, le vingt-deuxième jour de juillet mil huit cent soixante-quatorze, et a constamment été depuis, et dès avant le troisième jour de septembre mil huit cent soixante-dix, registrateur pour la division d'enregistrement de Québec ; que les plans et livres de la cité de Québec, dans la dite division d'enregistrement, ont été déposés suivant la loi avant la date en second lieu mentionnée, et à laquelle il fut, par proclamation du Lieutenant-Gouverneur, donné avis que les dispositions de l'article 2168 du code civil deviendrait en force pour le quartier St. Roch le premier jour d'octobre alors prochain.

" Considérant que le défendeur n'a pas, depuis cette dernière date jusqu'à celle de l'institution de l'action en cette cause, fait l'index des immeubles du dit quartier St. Roch, dans la dite cité de Québec, et qu'il ne l'a pas continué jour par jour, en inscrivant sous chaque numéro de lot indiqué séparément au plan et au livre de renvoi, un renvoi à chaque entrée faite subséquemment dans les autres livres ou registres, affectant tel lot, de manière à mettre toute personne en état de connaître facilement toutes les entrées faites subséquemment concernant ce lot ; et que par cette désobéissance à la loi et cette négligence à se conformer à ses dispositions sous ce rapport, le dit défendeur a encouru une amende de cent piastres, dont le demandeur poursuit recouvrement tant pour lui que pour la Couronne ; le dit défendeur est

condamné à payer cent piastres de pénalité, dont moitié à la Couronne et moitié au demandeur, et est en outre condamné à payer au demandeur ses frais et dépens en cette cause." Montizambert
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Pemberton, for appellant. The first question which the appellant submits to the consideration of the Court, is whether there is any Law in force imposing a penalty on the registrar for a default to keep such an index as the law requires.

It will be observed that in his declaration the respondent refers to article 2166 of the code for the law which provides for the making and depositing in the registry office, by the Commissioner of Crown Lands, of the Books of reference and plans which are required to perfect the registration system ; to article 2168, for the Law which provides for the general effect on the public of such deposit, and to article 2169, for the Law making provision for the proclamation of the Lieutenant-Governor, which puts the law in force ; but when he refers to the index which the registrar is required to keep, and the penalty incurred for his default, he refers to section 76 of chapter 37 of the Consolidated Statutes of Lower Canada ; this section is in the following terms : " From and after the day appointed in any such proclamation as that on which section seventy-four shall apply to any county or registration division, the registrar thereof shall make and write up regularly, day by day, the index of estates, entering under each lot or parcel of land separately mentioned in any plan and book of reference, deposited in his office, a reference to every entry thereafter made in his other books affecting such lot or parcel of land, so as to enable him or any other person easily to ascertain all the entries affecting it, made after that time, and for any disobedience to or neglect of the requirements of this section, the registrar shall incur a penalty of one hundred dollars, in addition to any other punishment or liability to which he may be subject therefor."

It is specifically under this section, and for a non compliance with its terms, that the present action has been brought ; but in fact this section is no longer in force, having been abrogated by article 2171 of the code which enacts : " From and after the day appointed by such proclamation, the registrar must, from day to day, make up and continue the index to immoveables by entering under the number of each lot separately designated

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upon the plan and book of reference, a reference to each entry thereafter made in the other books and registers affecting such lot, so as to enable any person easily to ascertain all the entries concerning it made after that time ; " it cannot be denied that this article makes express provision upon the particular matter to which section 76 of chapter 37 of the consolidated statutes of Lower Canada relates, and upon this head article 2613 of the civil code enacts : " The laws in force at the time of the coming into force of this code are abrogated in all cases ; in which there is a provision herein having expressly or impliedly that effect ; in which such laws are contrary to or inconsistent with any provision herein contained ; in which express provision is herein made upon the particular matter to which such laws relate." It is, therefore, clear that the section upon which the present action is founded no longer exists, but has been abrogated or repealed by the code. As the code provides no penalty for the infringement of this section, it follows that the penalty can no longer be enforced. It may be said that as the code makes no provision for a penalty that the concluding part of the clause 76 remains unrepealed ; this argument could not under any circumstances have any weight, but the penalty is imposed for " any disobedience to or neglect of the requirements of this section," and if the section is repealed, nothing remains to which the penalty can apply. See the codifiers report, civil code, 1st vol. p. 58, 238' C. C. 2159

Bédard, for Respondent. Toutes les raisons que peut fournir l'appelant contre le jugement dont il se plaint se résument à celle-ci : la sect. 76, ch. 37, S. R. B. C., est abolie, et pour le prouver, il dit : L'art. 2171 du code civil reproduit la sect. 76, mais elle ne parle pas de la pénalité. Donc en vertu de l'art. 2613 du code civil, cette section 76 du statut est rappelée, et il n'y a plus de pénalité.

Il ajoutera probablement un autre argument que voici : La section 75 du Statut, reproduite par l'art. 2169 du code civil, suppose que les plans et livres de renvoi de toute la circonscription d'enregistrement sont faits et déposés avant que commence l'obligation imposée par la section 76 du Statut, art. 2171 du code. Or l'Intimé n'allègue la confection et le dépôt des plans que pour une partie de la division d'enregistrement. Donc le registrateur est encore à temps pour faire l'index, et n'a pas encouru la pénalité.

Ni l'une ou l'autre de ces raisons n'est satisfaisante. Nous allons essayer de la prouver.

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Nous dirons en premier lieu que la pénalité édictée par la section 76 du statut n'a jamais été rappelée et subsiste encore. Et voici quelques-unes des raisons qui peuvent servir à le prouver.

Le législateur en promulguant le code civil, n'a pas entendu dire que le chapitre qu'il consacre à l'organisation des bureaux d'enregistrement depuis l'art. 2158 à l'article 2182, comprendrait toute la législation sur cette matière, et que toute loi antérieure non reproduite au code sur ce sujet était abolie par la même. Un grand nombre de dispositions relatives à l'enregistrement et dont le code ne dit rien, subsistent encore. Les codificateurs, dans la confection du code, se sont tenus autant que possible dans les limites qui lui étaient indiquées par le titre même de leur ouvrage ; ils ont dit quel était notre *droit civil*, et dans les matières complexes, ils s'en sont tenus à leur cadre en élaguant ce qui leur était étranger. Pour n'en donner qu'un exemple, dans toutes les questions qui se rattachent à la procédure, ils se contentent de référer au chef-d'œuvre qui n'existait pas alors et que depuis l'on a connu sous le nom de code de procédure civile. Avec bien plus de raison encore, les codificateurs ont-ils évité de mêler du droit pénal ou administratif au droit civil et sans vouloir en aucune manière abroger ce qu'ils ne copiaient pas dans nos lois souvent si complexes, ils prenaient ce qui convenait à leur sujet, et pour le reste référaient aux sources. C'est ce qu'ils ont fait à propos de l'organisation des bureaux d'enregistrement, et c'est écrit en toutes lettres à l'art. 2165. Ceci résulte aussi clairement de l'art. 2159 qui parle spécialement de pénalités imposées par la loi, sans dire quelles elles sont. Les lois qui promulguent ces pénalités ne sont donc pas abolies. C'était bien là l'intention des codificateurs ; mais pour ôter tout doute, la législation a ajouté l'art. 2165 qu'on ne trouve pas au projet de code. En référant au projet du code, vol. III, page 206, art. 72, on trouve la loi telle qu'elle existait alors, mais la clause pénale est omise. Est-ce à dire qu'elle est abolie ? pas du tout. Les codificateurs n'en parlent pas parce que ce n'est pas leur affaire, et le législateur en a fait autant.

Voilà pourquoi on ne trouve pas au code civil la disposition

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que voudrait y voir l'appelant. Le législateur n'en a rien dit. Il s'est contenté non pas de modifier, d'abroger la sect. 76, il l'a reproduite textuellement, et quant à la sanction pénale de cette section 76, comme c'est du droit pénal, il n'en a rien dit, c'est-à-dire qu'il l'a laissée en force. Que l'on arrange l'art. 2171 comme l'on voudra, on ne pourra le combiner avec l'art. 2613 et l'on restera toujours avec l'art. 2165 qui est général et positif.

Nous en concluons : 1° que la section 76 du statut n'a pas été rappelée, mais continuée par l'art. 2171 ; 2° que la sanction pénale de la section 76 s'applique encore à l'obligation imposée par la section 76 continuée dans l'art. 2171. Autrement les arts. 2159 et 2165 ne signifient rien.

Si ce raisonnement laissait encore des doutes dans l'esprit de quelqu'un, nous lui dirions qu'en principe général, toute loi a sa sanction, et que sans la sanction, la loi est une formule ridicule et impuissante. Or l'appelant, par sa manière d'interpréter, suppose que la législature a aboli une bonne loi, revêtue d'une excellente sanction, et l'a remplacée par la même loi dépourvue de toute sanction. Ça aurait été bien de la peine à prendre pour arriver à un si beau résultat. Toute interprétation qui conduit à l'absurde est mauvaise. Il faut avant de chercher ce que signifie la loi, commencer par admettre que le législateur a le sens commun.

Notre réponse à la deuxième objection sera plus courte encore, et non moins concluante.

Pour s'en convaincre, référons à la section 5 du ch. 25, des statuts de Québec, 32 Victoria. Ce texte étend à toute partie d'une division d'enregistrement les dispositions des arts. 2166 à 2176 du code civil, et du ch. 37 des Statuts Refondus du Bas-Canada. L'objection est donc sans fondement.

Ce texte, postérieur au code civil, prouve de plus que le ch. 37 du S. R. B. C. subsiste encore. Pourtant, il est reproduit au code presque textuellement.

Cette cause présente une question nouvelle, et de la plus haute importance pour le public. Il s'agit de savoir si le public paiera les dépenses de confection des cadastres sans profit, si sur ce sujet, nous serons laissés au désintéressement des régistrateurs

ou au bon vouloir de l'Exécutif. Heureusement, il ne se présente ici aucune difficulté sérieuse, et la solution est facile à trouver. Qu'elle soit conforme à la loi et à l'intérêt public, et nous avons lieu de croire que le jugement dont est appel sera confirmé.

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Per curiam.—La Cour, etc. Considérant que les dispositions contenues dans les clauses 74, 75 et 76 du ch. 37 des S. R. B. C. relativement au dépôt des plans et livres de renvois officiels dans chaque circonscription d'enregistrement et à l'obligation imposée à chaque registrateur de tenir jour par jour un index d'après les numéros de chaque immeuble désigné aux dits plans et livres de renvois officiels à compter du jour fixé par proclamation du Lieutenant-Gouverneur, ont été abrogés en vertu de l'article 2613 du code civil par les dispositions expresses sur le même sujet contenues dans les articles 2168, 2169, 2170 et 2171 du même code.

Et considérant que la disposition contenue dans la clause 76 du ch. 37 des S. R. B. C. imposant une pénalité de \$100 à tout registrateur qui aurait négligé de se conformer aux exigences de cette clause, n'a pas été renouvelée soit dans le code civil ou dans aucune autre disposition législative subséquente, et que cette pénalité ne peut s'appliquer aux registrateurs qui négligeraient de se conformer aux dispositions du code qui sont postérieures à ce statut.

Et considérant que l'appelant ne pouvait être condamné à payer cette pénalité de \$100 pour n'avoir pas fait l'index qu'il devait tenir en vertu de l'article 2171 du code civil.

Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Québec, le 8 septembre 1875, cette Cour casse et annule le dit jugement, et renvoie l'action de l'Intimé avec dépens.

SANBORN & TESSIER, J. J., *dissentientibus*.

Judgment reversed.

Holt, Irvine & Pemberton, for Appellant.

Bédard & Rouleau, for Respondent.

COURT OF REVIEW, QUEBEC.

31 OCTOBER, 1878.

Coram MEREDITH, C. J. STUART J., CARON, J.

LOTTINVILLE vs. MCGREEVY.

HELD :—That a judgment maintaining a demurrer to part of a declaration, is an interlocutory judgment, and therefore cannot be revised by three judges in Review.

MEREDITH, C. J.

The plaintiff sues for \$235. Defendant demurred to the declaration to the extent of \$200. The demurrer was maintained, and the plaintiff now inscribes "pour audition en revision *sur le jugement interlocutoire*."

We are of opinion that the judgment impugned could be revised at the final hearing, that therefore it has been correctly described by the party inscribing as "*un jugement interlocutoire*," and consequently that it is not one which could legally be brought under the consideration of the Court of Review, as now attempted.

We therefore discharge the Inscription, but without costs, as it was acquiesced in by the defendant.

Inscription discharged.

COURT OF REVIEW, QUEBEC.

31st OCTOBER, 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.

TOURIGNY vs. BOUCHARD.

Held:—That the rule in petitory actions that a deed not pleaded cannot be produced at enquete as part of a chain of titles, does not apply to actions for moveables, and on the contrary in such actions title need not be alleged.

That a bailee of moveables cannot question the title of the person who placed such moveables in his care.

MEREDITH, C. J.,

The plaintiff in the summer of last year, with the consent, and at the suggestion of the defendant, placed six horse rakes for safe keeping in a building belonging to the defendant; with the understanding, and indeed upon the agreement, that as soon as the rakes subjected the defendant to inconvenience, he would let the plaintiff know, in order that he might send for them.

The following autumn the plaintiff, then having room for the rakes, went to get them, but the defendant said, in effect, they were not in his way; and they were left in the defendant's premises, upon the same understanding as before.

It is quite plain from the evidence of all the witnesses, that the storage of the rakes was regarded by both parties as being nothing more than a friendly turn, and two of the witnesses Honoré Rocheford and Nazaire Tourigny expressly say that the defendant declared no charge was to be made.

Unfortunately, in the winter, some difficulty occurred between the parties, and in the spring the defendant refused to return them unless the plaintiff paid him \$6, and hence the present *saisie revendication*.

We quite agree with the learned Judge in the Court below in saying: "*Les allégations de la déclaration sont bien prouvées.*" But the learned Judge was of opinion that the *saisie-revendication* could not be maintained, because the plaintiff did not show that

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Bouchard.

he had any right to such a process. It seems to us however that as the defendant got the rakes from the plaintiff upon an agreement to give them back, to him, when required, that the defendant cannot be allowed to question the right to the property in dispute.

In the judgment of the court below the case of *Pouliot v. Scott*, K. B. Quebec, 1820, is cited as deciding "That in revendication, the title on which the plaintiff rests his demand must be specially set forth in the declaration."

The only reference in print to the case cited, that I know of, is to be found in the "Revue de Législation," vol. 3, p. 195, where in addition to the words given in the judgment, we find the following: "And if it is not (that is if the title be not distinctly stated in the declaration,) it is good cause for exception *à la forme*." No such exception was filed in this case.

Since writing as above I have caused search to be made for the record in *Pouliot v. Scott*, K. B., Quebec, 1820, and I find by the declaration, that it was a petitory action respecting real estate. Now it has been expressly held by the Court of Appeals (1) that a deed not pleaded, in a petitory action, cannot be produced at enquete as part of a chain of titles. But the same rule does not apply to actions for moveables. On the contrary in the case No. 141, *Côté v. Ross*, April 1871, it was held by the Court of Review, (MEREDITH, STUART, TASCHEREAU,) that in actions for moveables title need not be alleged. (2)

Upon the whole we think the plaintiff had a right to get possession of the rakes, we also think that the attempt of the defendant to exact \$6 was unjust; that there is not any defect

(1) Gibson vs. Weare, L. C. R., vol. 11, p. 98.

(2) Mr. JUSTICE TASCHEREAU dissented in that case, on the ground that a certain marriage contract had not been registered, but did not question the ruling of the majority of the Court, that in an action for moveables title need not be alleged. See also English Rule as to actions of trover. Leigh Nisi prius, vol. 2, p. 1476; also form given 1st vol. Pigeon, edition of 1779, p. 116.

in the proceedings of the plaintiff which can defeat his claim, and consequently that the judgment under review must be reversed. Tourigny
v.
Bouchard.

Judgment reversed.

COURT OF REVIEW, QUEBEC.

SEPTEMBER, 1878.

Coram MEREDITH, C. J, STUART, J., CASAULT, J.

ROY vs. DION.

Held :—That a clause in a deed of sale providing that the purchaser shall pay all hypothecary creditors, is not equivalent to an *indication de paiement*.

MEREDITH, C. J.

One Joseph Nadeau, in 1871, hypothecated certain real estate in favor of the plaintiff for \$500. and afterwards in 1875, sold the same real estate to the defendant for \$750 which sum the defendant undertook to pay to Nadeau's creditors. The words of the deed of sale are: "C'est-à-dire toutes les dettes hypothécaires tant en capital qu'en intérêts, qui affectent les terrains sus vendus, de la même manière que les vendeurs y sont tenus et obligés eux-mêmes, faisant du tous sa propre affaire et dette, et en décharge les vendeurs." The plaintiff who was not a party to the deed of sale, and whose name is not mentioned as a creditor, has brought a personal action on that stipulation, which has been dismissed on the ground, "qu'il n'y a pas de lien de droit entre le défendeur et le demandeur, et qu'il n'y a pas même d'indication de payement."

We think the judgment right, and as a further reason in support of it, I may observe that the action calls upon the Court to distribute Nadeau's money in his absence.

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v.
Dion.

Nadeau may have paid the plaintiff between the date of the obligation in 1871, and the sale in 1875.

The plaintiff is not in a better position than a plaintiff suing out a *saisie-arrest*, after judgment, and he could not obtain an order for the payment to him of funds belonging to the defendant, without notice to the latter.

For these reasons, we think the judgment must be confirmed.

COURT OF REVIEW, QUEBEC.

31 OCTOBER, 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.

SEWELL vs. BOURK

AND

LANGLOIS,

Adjudicataire

Held:—That an adjudicataire may obtain a writ of possession after the expiration of a year and a day from the date of the adjudication, provided he move for the same within the year and day from the judgment of distribution.

The present case distinguished from *Hart v McNeil*, 4 L. C. J. p. 8.

MEREDITH, C. J.

Certain real estate, sold by sheriff's sale in this cause, was adjudged to Mr. Fisher Langlois on the 14th October 1867; and he gave a bond for the purchase money. Owing to various proceedings in the court below, the judgment of distribution was not homologated until the 3rd July 1877; and some time afterwards, a title deed was made by the sheriff in favor of the *adju-*

dicataire who, on the 22nd of June last, moved for a writ of possession against the defendant.

Sewell
v.
Bourk.

The motion was rejected, the *considérant* of the judgment being: "L'*adjudicataire* se présente trop tard. Il aurait dû agir avant l'expiration de l'an et jour après l'adjudication, il devra procéder par action pétitoire." And in support of this view reference is made to the case of *Hart v. McNeil* 4 L. C. J. p. 8.

In that case however, it does not appear that there was any cause to prevent the *adjudicataire* from proceeding within the year and day that followed the adjudication, whereas, in the present case, the *adjudicataire* could not proceed until he had paid the adjudication money. By law he had delay for paying the adjudication money until there was a judgment of distribution; and he did move for a writ of possession within a year from the rendering of the judgment of distribution.

We therefore think that the case of *Hart v. McNeil* is different from the case before us, and that, in the present case, the *adjudicataire* is entitled to a writ of possession under art. 712 of the code of procedure.

Judgment reversed.

COURT OF REVIEW, QUEBEC.

31st OCTOBER, 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.

NOEL vs. LAVERDIÈRE

AND

THE BRITISH AMERICA LAND CO., Opposants.

A condition in a promise of sale, that although followed by possession, it should not be equivalent to a sale, *held*, valid.

Review of a judgment rendered by the Superior Court at
Arthabaska, PLAMONDON, J., on the 9th July, 1878.

Crepeau was heard for the Plaintiff, in review, and *Lavergne*, for the Opposants.

MEREDITH, C. J.

The opposants acquired the land in dispute, by a deed *sous seing privé*, bearing date the 21st April 1837, duly registered ; a copy whereof was produced with their opposition, *the original at the enquete*.

On the 9th June, 1869, the opposants gave the defendant a location ticket for the said land, and the plaintiff having caused it to be seized as belonging to the defendant, the opposants have claimed it by an opposition *afin de distraire*, which is contested by the plaintiff.

On the part of the plaintiff it is said that the location ticket was, in reality, a promise of sale, and being followed by tradition and actual possession, was under article 1478, C. C., equivalent to a sale. The opposant answers by referring to a condition in the location ticket in these words : "The possession to be given to the purchaser, in pursuance of this contract shall not have the effect of rendering this promise of sale equivalent to a sale, it being expressly agreed that this contract shall only have the effect of a personal covenant, between the parties hereto ; and the said B. A. L. Co., shall be and remain seized as proprietors of the immovable hereinabove mentioned until all the payments, herein stipulated to be made, shall have been completed, &c."

This is a perfectly legitimate clause, the object being to enable the owner to avoid the costs of a sheriffs sale in the event of the stipulated purchase money not being paid.

But the plaintiff says the opposants cannot have the benefit of the location ticket to the defendant, as it was not registered. The answer is, it did not require to be, and indeed could not legally be, registered ; as it is, and purports to be, nothing but a personal covenant, and does not create any *real right*. Moreover the opposants do not found their claim on the promise of sale ; on the contrary, they claim under the deed from Hughes in 1837,

which was duly registered. As a matter of fact however, the plaintiff was not led astray by any want of registration on the part of opposants. All that the plaintiff had to do, before making advances to the defendant, was to go to the Registry Office, and he could have easily ascertained that the defendant had no title to the property.

Noel
v.
Laverdière.

It was also very strenuously contended by the plaintiff, that the defendant had made considerable improvements on the property in question ; and that mere justice to the creditors required the opposants to content themselves with an opposition *afin de conserver*, provided security were given that the property would sell for a sufficient sum to pay the opposants. According to this contention the opposants were required to allow *their property* to be sold, so as to cause the *Defendant's* debts to be paid ; but the plaintiff has not cited, and I do not know of, any law which subjected the opposants to any such obligations, Article 2073 of the civil code, specifies certain cases in which property may be sold, on security being given that it will sell for sufficient to pay the prior claims of the holder, but the present case is not one of them.

It appears by the letter F, produced by the attorney of the plaintiff, that the offer made by the opposants was "If they are paid their debt and costs of opposition they are willing to transfer their claim to you or any other creditor."

This it appears to us is exactly what the plaintiff was entitled to under article 1156 C. C., and we think it much to be regretted that the offer thus made was not accepted.

It is quite possible that had the opposants accepted the offer made *by the plaintiff* they would have been paid ; but there was no certainty of it. The opposants were entitled to their property in default of payment, and instead of payment, the Plaintiff offered them a *cautionnement*. We therefore think that the judgment rejecting the contestation of the plaintiff and maintaining the opposition, must be confirmed.

Judgment confirmed.

COURT OF REVIEW, MONTREAL.

31st OCTOBER 1878.

THEORET vs. OUIMET,

RIGHT OF PASSAGE—SERVITUDE—TITLE.

HELD :—That where a passage way has been opened and used from time immemorial, no title of servitude is requisite to support an action *confessoria* for encroachments on the same. (1.)

MACKAY, J.

This was an *action confessoire* relating to a passage way, and the action was dismissed in the court below, the court there holding that the plaintiff could not maintain his action because he had no title of servitude, and therefore no right to bring an *action confessoire*.

It was established in evidence that the passage in question had been opened by the Seminary and used from time immemorial, and that the defendant has been making encroachments thereon.

We think that the action was properly brought, and that it was not necessary for the plaintiff to show a title of servitude, but that the *rue maintenue* by the Seminary made a title for all the world. The action should have been maintained, and the judgment below will therefore be reversed, and \$10 damages allowed with costs of both courts against the defendant.

Judgment reversed.

(1) See *Parent v. Daigle*, decided by the Court of Review, Quebec, reported at page 154 of this volume.

COURT OF REVIEW, QUEBEC.

31st OCTOBER 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.BLAIS vs. LEARMONTH *et al.*,

AND

GOWEN, *adjudicataire*.

FOLLE ENCHÈRE—ARTICLE 695, C. C. P.

Held :—That a false bidder is not relieved from his liability by a subsequent false bid, although higher than the first, and sufficient to cover the first bid with interest and the costs incurred on the resale.

MEREDITH, C. J.

In this case a judgment has been rendered against the *adjudicataire* (Gowen) as a false bidder and he contends that he has been relieved from responsibility by the fact that, in the interval between the adjudication to him, and the actual sale of the property, it was regularly adjudicated to another false bidder, for an amount more than sufficient to cover his (Gowen's) bid, with interest, and the costs of the resale.

No authorities have been cited in support of this contention, which, I must say, appears to me not only unreasonable, but contrary to the plain words of our law. Article 693 declares that he (the false bidder) is "moreover bound to pay the difference between the amount of his bid and the price brought by *the actual sale*."

And article 695 further provides that "if the price of the *resale* is not sufficient to cover the amount of the first purchase, with interest thereon and the costs incurred on the resale, the false bidder may be held to pay the difference.

The words of the French Code of procedure, art. 744, are "Le fol enchérisseur est tenu par corps de la différence de son prix, d'avec celui de la *revente* sur folle enchère," and under this provision of law, which is substantially the same as our own,

Biais
v.
Learmonth
et al.

the french courts have held that by the resale, or *revente*, is to be understood, not a second false bid, but an actual sale, that is an adjudication followed by the payment of the price.

Thus in *Dedlet v. Jeuffroy*, the tribunal de la Seine by a judgment rendered on the 26th November 1831 held : " Le fol enchérisseur n'est pas libéré par une folle enchère subséquente qui aurait porté l'immeuble a une valeur supérieure au prix pour lequel il s'était lui-même fait adjudicataire, son adjudication subsiste avec toutes les obligations qui en sont la suite, jusqu'a ce qu'il y ait une vente réelle et effective de l'immeuble. En conséquence il est tenu solidairement et par corps, avec tout nouveau fol enchérisseur, de la différence de son prix d'avec celui pour lequel l'immeuble est définitivement vendu."

The judgment thus rendered was confirmed by the Cour Royale de Paris on the 11th April 1834, and by the Cour de Cassation, on the 25th February 1835 ; one of the considerations of the Cour de Cassation, being : " Que par ces mots *prix de la revente*, le législateur n'a entendu et pu entendre que le prix sérieux et effectif qui réalisera, seul au profit des créanciers du saisi, un gage pécuniaire sur lequel ils puissent faire valoir utilement, les créances qui ont été les causes de la poursuite d'expropriation forcée. Que le paiement par corps de la différence qui existe entre le prix de la revente, et celui déjà obtenu par l'adjudication qui a terminé la poursuite de saisie immobilière, est la juste punition de la témérité de l'adjudicataire, et la juste indemnité des retards apportés par lui au paiement des créanciers." Que si la position d'un premier adjudicataire fol enchérisseur, ne doit pas être aggravé par la témérité d'un second, il est également visible, que le fait de celui-ci ne saurait améliorer la position du second jusqu'au point de l'exonérer complètement des suites de sa propre témérité. (1)

It was also contended by the first adjudicataire that the court could not legally change the conditions of the sale.

It is true that in consequence of there having been two false biddings, the order for the resale directed that every bidder

(1) Sirey 1835. Part. I, p. 571, 572.

should be required to deposit or pay a sum equal to one third part of the debt due the seizing party but not to exceed \$400. There was of course no such condition when the property was adjudicated to Mr. Gowen, and it is contended upon the authority of the judgment of the Court of Appeals, in *Evans v. Nichols et al.*, (1) that the sale upon the false bidding could not legally be ordered on terms or conditions different from that of the original sale and adjudication. But that judgment was rendered before the passing of the 16th Vict., ch. 194; the 23rd section of which expressly authorises the condition of which the *adjudicataire* complains.

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It was also maintained by the first *adjudicataire* that the judgment was wrong because it ordered coercive imprisonment upon Bickell's petition, without a special rule granted, by the court, as mentioned in art. 781. The answer given by Bickell, which seems to me conclusive is that his proceedings were taken under, and are in accordance with arts. 690 and 695 of the code of procedure; and that under those articles a special rule is not required in a case such as the present. Besides what article 781 seems to forbid, is the *carrying into execution* of a judgment ordering coercive imprisonment, without a special rule granted by the Court, &c., and it does not appear that any attempt has been made "to carry into execution." The order of which the *adjudicataire* complains.

Our attention was also drawn to the fact that Bickell's petition is stamped as a proceeding in the Circuit Court, instead of being stamped as it is said, it ought to have been as a proceeding in the Superior Court.

The action was brought for \$100 and interest, and was of course instituted in the Circuit Court, where also, the judgment was rendered.

Under art. 1090, the record has been transmitted to the Superior Court for the distribution of the money levied, and the proceedings in such a case, subsequent to the return of the papers into the Superior Court, require to be stamped according to the lowest tariff of the Superior Court. Bickell's petition appears to

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have been stamped according to that tariff; and the prothonotary informs us that it has been stamped in accordance with the usual practice of the Court; and such being the case the objection now being considered cannot be maintained.

The *adjudicataire* also complained that although interested in the sale of the property, quite as much as either the plaintiff or defendant, that he had received no notice of the proceedings against the other false bidders. We do not think however that the *adjudicataire* failing to pay his bid, can be deemed a party in the case, so as to be entitled to notice of any proceedings excepting those taken *directly* against himself.

Upon the whole, and having given the case the best consideration in our power, we see no reason to disturb the judgment of the court below.

Judgment confirmed.

SUPERIOR COURT, QUEBEC

19TH SEPTEMBER, 1878.

No. 418.

Coram McCORD, J.

BANK OF MONTREAL vs. AUDETTE *et al.*,

INSOLVENCY—ENDORSER—FRAUDULENT PREFERENCE.

HELD :—That the circumstances of this case do not disclose fraud, concealment or collusion, or any attempt whatever by Plaintiff to obtain a preference over other creditors.

That there is no principle of common law, statutory provision or rule of public policy sanctioned by jurisprudence, requiring that all creditors being parties to a deed of composition should, irrespective of the existence of good or bad faith, detriment, in-

justice or inducement, or otherwise, be in perfectly the same position, to the extent of invalidating security given to one or more creditors, because others had not received it.

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Per curiam.—This action is brought on a promissory note against Audette and others as makers and Rémi F. Rinfret as endorser. The issues raised are between the plaintiffs and Rinfret alone.

This defendant pleads that Audette & Co. by deed of composition with their creditors, the plaintiffs being among the number, agreed to pay each of the creditors 25 cts. in the dollar by their promissory notes at 6 months for half and 12 months for the other half of that amount. That the plaintiffs and the other creditors accepted this settlement, but that the plaintiffs fraudulently and collusively and to the detriment of the other creditors obtained from Audette & Co. security for their claim beyond what was agreed to in the deed of composition namely the defendant Rinfret's endorstation, and that the plaintiffs signed the deed of composition upon the express condition previously agreed upon secretly between them and Audette & Co. that their claim would be secured and this in fraud of and in preference over the other creditors. The plea concludes that the note be declared fraudulent and null.

The plaintiffs reply specially.

1. That they never conferred with any other creditor as to whether the notes to be given were to be *secured* or not, that *their* agreement was to accept secured notes, and upon receiving them, the note now sued upon being one of them, they signed the composition.

2. That there was no secrecy or collusion or agreement to obtain a preference.

3. That plaintiffs signed last, that their name was not inserted in the deed when the other creditors signed, and that no other creditor was induced by their act to accept the composition or sign the deed or to accept unendorsed notes or to refrain from asking for security.

The evidence taken establishes :

1 That either the plaintiffs or the Merchants' Bank were

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the last to sign the composition deed and that their name was not inserted in the deed when the other creditors signed.

2. That three other banks and two other creditors had likewise obtained security by the indorsation of the notes given to them under the deed of composition.

3. That the plaintiffs instead of seeking a preference over the other creditors were given to understand by Audette & Co., that some of these other creditors had also required security.

4. That the plaintiffs had no knowledge that all the other creditors were not receiving security also.

As the case now comes before the court there is not the slightest proof of fraud, of concealment, of collusion, or of any attempt whatever to obtain a preference over other creditors, nor does the testimony of any of the witnesses shew that the security given to the plaintiffs was at all detrimental to the interests of any of the other creditors, on the contrary the very reverse is proved.

But more than all this, there is not the slightest proof that the plaintiffs by any act of theirs, even unintentionally obtained an unjust preference over other creditors, or induced others to sign a composition which they would not have signed had they known that the plaintiffs were to receive indorsed notes. Here again the evidence tends to establish the very contrary.

The question therefore reduces itself to this :

Is there any principle of common law, any statutory provision or any rule of public policy, sanctioned by jurisprudence, requiring that *all* creditors being parties to a deed of composition should *irrespective of the existence of good faith or bad faith, detriment or no detriment, injustice or no injustice, inducement or no inducement*, be in perfectly the same position, and that to such an extent that security given to one creditor and not to others will invalidate the security thus given ? I may go further, for the pretension of the defendant leads to that in this case, and say, to such an extent that the security given to all the creditors, except even one, would be invalid because that one creditor had not received it ?

I know of no such law, principle or rule. On the contrary I find that there has been statutory legislation to create such a rule for insolvents under the insolvent act, and I conclude that without this legislation such a rule would not affect even insolvents under the act, and *à fortiori* would not apply to debtors who did not come under the provisions of the insolvency law.

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The defendant contends that there is such a rule, and relies in support of his pretensions upon several citations from Forsyth on compositions, and principally upon the case of *Knight v. Hunt*. Both parties in fact have cited numerous authorities, only two or three of which I consider applicable to this case and one only of which I deem to be perfectly so.

These authorities I will now refer to.

The case of *Cockshot v. Bennett* (1) is not applicable, for there, "it appeared that the rest of the creditors would not have signed "the deed unless the plaintiffs did so likewise," and Lord KENYON and the other judges all base their decision on the ground that there was fraud. In fact the transaction was plainly in fraud of the other creditors for it consisted in the defendants giving the plaintiff *his own* note for 9s. in the £ more than agreed to by the composition, and did not merely consist as in this case in the intervention of a third party, whose becoming security did not diminish the debtor's ability to pay his other creditors.

The case of *Fiese v. Randall* (2) is in point. The debtor had compounded for 15s. in the £, 10s. payable by accepted bills, and the other 5s. by his own notes. He gave the plaintiff accepted bills for the whole 15s. It was urged in this case that the transaction was in fraud of the other creditors, but Lord KENYON was of a different opinion and the plaintiff obtained a verdict. On motion to set aside the verdict it was argued "that this was a "secret advantage gained by the plaintiff, which the other creditors had not in their contemplation at the time and which "contravened the principle on which the composition deed was "framed, namely an equality of advantage and risk." The Court

(1) 2 Durnford and East, 763.

(2) 6 D. & E., 146.

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nevertheless refused the rule, holding that there was no fraud upon the other creditors, and "it was no fraud upon them that another person had agreed to join his security to the debtors for the payment of the same sum that all the other creditors were to receive."

The case of *Leicester v. Rose* (1) is in point only in so far as it decides that the stipulation to receive *better security* may be as much in fraud of the other creditors as the stipulation to receive *more money*, otherwise it does not apply, because fraud is clearly proved in that case while none is proved in this. The terms of the composition were that all the instalments payable, *except the two last*, were to be secured by *endorsed notes*. Several creditors refused to accede to the terms unless the plaintiffs did, *the plaintiffs were told this* and yet they refused to sign unless they received endorsed notes for the two last instalments as well as for the others, these notes they eventually did receive without the knowledge of the other creditors, who were thus, as is expressly proved, *induced* by the plaintiffs' signature to sign on less advantageous terms than the plaintiffs themselves had obtained, and upon terms which they had refused to agree to, unless the plaintiffs first accepted them.

The decision in the case of *Lewis v. Jones* (2) is not in point, as the question there was whether the defendant as surety (by the endorsement of a note) had not been discharged by the subsequent compounding of the plaintiffs with the principal debtor and whether the plaintiffs could produce verbal testimony of his having been induced by misrepresentation to sign a composition unconditionally. The dictum of BAYLEY, J., to the effect that a creditor who by signing a composition induces others to sign it and makes a private bargain with the debtor to secure better terms than the others, commits a fraud on the creditors, is not in point either, for as I have already said, I assume that in this case there has been no fraud whatever.

The case of *Knight v. Hunt* (3) is decidedly in point and in apparent contradiction of the decision in *Fiese v. Randall*.

(1) 4 East R. p. 381.

(2) 4 Barn & Cress, 511. (1825).

(3) 5 Bing, 432 (1829).

Here the debtor had compounded for 10s. in the £, but the defendant's brother to induce plaintiff to sign the composition had given him the other 10s. in coal, without the knowledge of the other creditors. The plaintiff was the last creditor to sign.

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The offer of the defendant's brother was spontaneous and without the defendant's participation. The transaction was attended with no detriment to the insolvent or to the creditors; and yet the Court (BEST, C. J., PARKE, J., and BURROUGHS and GASELEE concurring), held that the plaintiff had no action against defendant for the 10s. stipulated by the composition, inasmuch as he had already got that much from defendant's brother, and that his getting more would be in fraud of the other creditors and BEST, C. J., bases his opinion upon a principle which he says is to be extracted from all the cases on this subject, namely that "a man who enters into an engagement of this kind is not "to be deceived." Undoubtedly where there is deceit the transaction should be held void, but I am at a loss to see in the circumstances of this case, *as reported*, any deceit whatever, and I am therefore disposed to give more weight to the decision in *Fiese vs. Randall* than to that in *Knight vs. Hunt*, as applicable to the present suit.

The case of *Coleman v. Waller* (1) does not apply, because the decision declaring void the bargain between plaintiff and defendant, is based upon the assumption that other creditors were deceived by the plaintiff having signed the composition deed, under the inducement of the security given by the defendant.

The case of *Howden v. Haigh et al.*, (2) is another case which does not apply because there fraudulent preference and deceit are clearly apparent and form the basis of the judgment; the defendants had "misrepresented the amount of their assets by "concealing the acceptance of Messrs. Bried," which had been given to the plaintiff, and LITTLEDALE, J., says: "The agreement "contained a fraudulent stipulation which had the effect of depriving the creditors of part of the assets of the defendant, it "was therefore wholly void."

(1) 3 Younge & Jarvis, p. 212, (1829).

(2) 11 Ad. & Ellis, 1033. (1840).

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In *Bradshaw v. Bradshaw*, (1) the question is merely raised, and not decided, as to whether an insolvent, who has paid the full amount of his composition to a creditor, who had previously been paid £55, by a third party in order to induce him to sign, can recover back from such creditor £55 of the composition money as being over paid. This case therefore can afford no assistance in arriving at a proper decision.

The case of *Mallatien v. Hodgson* (2) is clearly one where the agreement between the debtor and one of his creditors was made in fraud of the other creditors and is therefore not applicable to the case now before me.

The case of *Greenshields et al. v. Plamondon* (3) as decided in Appeal is favorable to the plaintiffs' pretensions, though contrary to the opinion of Justices AYLWIN & BADGLEY. In this case the debtor, before the deed of composition, had given a note for \$400 with the understanding that it would not enter into the composition. The debt was not included in the deed of composition and the debtor settled with his creditors irrespectively of this claim.

The majority of the Court decided that this was not prejudicial to the creditors, and that as they had not complained and the defendant since his settlement had promised to pay, the plaintiff was entitled to recover on the note.

It is to be inferred from this decision that the Court considered detriment to the creditors necessary in order to invalidate the note, and were also of opinion that the defendant could not set up as an injury done to the creditors matters of which they themselves had not complained.

I do not say that I concur in this judgment, but I think that if the majority of the Court held the note good in *that* case they would *a fortiori* have held it good in *this* case.

(1) 9 Mees. & Welsb, 29. (1841).

(2) 16 Q. B. Rep. 689. (1851).

(3) 3 L. C. J., 240. 8 L. C. J., 192. 10 L. C. R., 251. (1860).

This decision was adopted and followed by Mr. Justice LORANGER in the case of *Perrault v. Laurin*, (9) though he expressed the opinion that such transactions should be declared null by statutory legislation.

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Taking from these authorities all that I deem applicable to the present case, I find the cases of *Fiese v. Randall* and *Green-shields v. Plamondon* to be in favor of the plaintiffs' pretensions, and the case of *Knight v. Hunt* apparently against them.

I have already said that I give more weight to *Fiese v. Randall* than to *Knight v. Hunt* as applicable to the present case.

In *Knight v. Hunt* although the facts, as reported, do not in my opinion disclose deceit, the expressions of Judge BEST imply that there was deceit, and in the case now before me it is proved that there was none.

I may remark moreover that the case of *Fiese v. Randall* is perfectly similar to the present one, but the case of *Knight v. Hunt* is not quite so. In the latter case the defendant was the insolvent himself who pleaded that the plaintiff had already received (*aliunde* it is true, but still on his, the defendant's, account) as much as he, the plaintiff, had agreed by the composition to accept from the defendant. Here the plaintiff has received nothing and his action is not against the insolvent, but, against a third party, and he demands no more than the amount to which he was entitled under the deed of composition.

The citations from Forsyth on compositions, which the counsel for the defendant seemed strongly to rely upon at the time of the argument, are all based upon precedents cited by the author, the strongest and the most applicable of which is the case of *Knight v. Hunt* of which I have already disposed.

So much for precedents and authorities.

Viewing the present case according to its own circumstances it seems to me that in none of the cases cited does the good faith of the creditor stand out as clearly as it does in this.

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As I have before said there is not the slightest proof of fraud, concealment, collusion, preference, detriment, or inducement.

The plaintiffs were the last to sign the composition deed, or if not, the only subsequent signer was a creditor who had stipulated for and who received similar security by endorsement. This signature was therefore no inducement for other creditors.

The plaintiffs not only were not informed that the notes to be given to others were not to be endorsed, but were told that several creditors besides themselves were receiving endorsed notes.

Then again, the security given formed no part of the property of the debtor, it was in no manner a portion of the *gage commun des créanciers*, and there was therefore no detriment to the other creditors, and nothing was taken or given from any assets that the creditors could claim or from anything against which they could have exercised the slightest right or privilege.

The interest of public order and morality have been invoked in favor of the defendant, but in this case the proof rebuts any presumption of an infringement of the requirements of public order or morality, and even if such a presumption could find place here the benefit of it would accrue to the other creditors rather than to the defendant.

He has himself infringed a principle of order and morality by breaking the promise by which he agreed to pay the plaintiffs, and seeking the benefit of his own act by claiming the nullity of his promise in consequence of a pretended fraud, to third parties, to which fraud, if any there were, he alleges himself to have been a party.

The debtors at the time of the transaction not being under the insolvent law, the defendant cannot invoke the nullity of of his own act, as being against a statutory prohibition. And the absence of all fraud, preference, deceit, concealment, detriment, or inducement being proved he cannot invoke a nullity founded upon public interests or the infringement of any principle of public morality. Even supposing therefore that in this case the other creditors had an interest to complain, that right would not belong to the defendant, for he would then be pleading the rights of others.

Upon the whole I have arrived at the conclusion that the plaintiffs are entitled to their judgment, which will of course go against the defendant Rinfret alone, the action having been returned as against him only.

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Considering that the plaintiffs have proved the material allegations of their declaration and that the defendant Rinfret has failed to prove either the fraud, collusion, concealment, fraudulent preference, inducement or detriment alleged in his peremptory exception, as grounds for demanding the nullity of the promissory note of Audette & Co. endorsed by him in favor of the plaintiffs.

Considering that the security given to the plaintiffs by the endorsement of the said note formed no part of the assets of Audette & Co. and did not diminish or affect in any way the rights or recourse of the other creditors of Audette & Co.

Considering that the receiving by the plaintiffs and giving by the defendant Rinfret of the endorsement aforesaid, under the circumstances proved in this case, did not infringe any public interest or any principle of public order or morality.

Considering that Audette & Co., were not insolvents under the Insolvent Act, and that the provisions of the said Act do not apply to the giving of the endorsement in question.

Considering that even if any of the creditors of Audette & Co., had an interest to complain, or to demand the nullity of the note in question or of the endorsement thereof, that right could not be invoked by the defendant, who does not in any manner represent them.

Doth dismiss the said exception of the defendant Rinfret, and doth condemn him to pay to the plaintiff for the causes mentioned in the plaintiff's declaration, the sum of \$171.82 with interest on \$169.22 from the 15th September, 1877, and costs of suit.

Judgment for Plaintiff.

Holt, Irvine & Pemberton, for Plaintiff.

Malouin & Malouin, for Defendants.

COURT OF REVIEW.

31st DECEMBER, 1877.

No. 14.

Coram MEREDITH, C. J. STUART, J. CARON, J.GAILLOUX *v.* BELL.

By order in Council of the Provincial Government [Quebec] costs of summoning witnesses and their taxation and other expenses attending the preliminary investigation of criminal offences, including constables fees, are chargeable to the party prosecuting and not to the Crown, in cases where the prisoner is not committed or held to bail to stand his trial.

The defendant having obtained the services of plaintiff as high constable in connection with an information for a misdemeanour, specially undertook to pay plaintiff's fees therefor "according to the government regulations now existing." It appearing that the prisoner had been sent for trial. **HELD:**—That the defendant could not be made liable for the fees due the plaintiff on account of the services so rendered by him.

MEREDITH, C. J.

This is an action for fees due to the plaintiff, as high constable, on account of his services in connection with an information for a misdemeanour, laid by the defendant against one Johnson and another.

There is no question as to the rendering, or as to the value of the services for which the plaintiff has recovered judgment.

What we have to determine is, can the defendant be held liable for the fees due the plaintiff on account of the services so rendered by him ?

The evidence adduced by the plaintiff shows that the services in question were rendered, in pursuance of instructions, received by him, from Mr. Genest clerk of the peace and that an arrangement was entered into, between Mr. Genest, and the defendant, as to the payment, by defendant, of the plaintiffs services.

Mr. Genest, speaking of the defendant, says : " Il s'est formellement obligé de faire face lui-même au paiement des honoraires et déboursés du demandeur en cette cause ; " but these important words are added in a marginal note, " Aux conditions posées par le gouvernement d'après les règlements par lui

"établi jusqu'alors." And his deposition as first drawn up, closed thus "Le défendeur avait dit de faire tous les frais nécessaires pour ce procès et qu'il payerait," to which, however, he added, "*suivant les règlements du gouvernement existant jusqu'alors*"

Galloux
v.
Bell.

A letter from the office of the attorney general, bearing date the 18th March, 1876, shows what were then the government regulations on the subject. It is as follows :

Québec, 18 mars 1876.

"Monsieur,

"Dans le but de faire disparaître certains doutes qui se sont élevés au sujet du paiement des frais dans les enquêtes préliminaires pour offenses criminelles, je suis chargé par l'Honorable Monsieur le Procureur-Général de vous mander que les frais de l'assignation des témoins ou leur indemnité, et autres dépenses dans les enquêtes préliminaires, ainsi que les services des grands constables ou autres constables, pour l'arrestation d'accusés, *dans les cas où il n'y a pas matière à procès*, sont à la charge des parties, et que la Couronne n'est responsable que des frais et honoraires des constables qui ont effectué l'arrestation des prisonniers, lorsque ces derniers *ont été incarcérés ou admis à caution pour subir leur procès à une cour criminelle*.

"Vous devez vous conformer aux instructions ci-dessus dans tous les cas de cette nature qui se présenteront devant vous."

J'ai l'honneur d'être,

Votre obéissant serviteur,

(Signé), JOS. A. DEFOY,

Asst. O. L. C.

It does not appear that the instructions thus given, by the government, to the clerk of the peace, on this subject, were in any way modified until he received a letter from the office of the attorney general, in the following words :

"Québec, ce 3 mai 1877.

"Monsieur,

"En vous renvoyant le compte du grand constable, je suis chargé par l'Honorable Monsieur le Procureur-Général de vous dire que l'item dans l'affaire de Thomas B. Trihey *et al.*, a été retranché en entier parce que l'offense n'est pas une félonie. Je

Gailloux
v.
Bell. " dois attirer votre attention à la 4ème section de l'acte 32 Vict.,
" chap. 15, qui ne pourvoit au paiement des services des consta-
" bles que dans les cas de félonie seulement."

J'ai l'honneur d'être,

Votre obéissant serviteur,

(Signé), J. A. DEFOY,
Assist. O. L. C.

The information laid by the plaintiff bears date *the 6th February, 1877*. The services of the plaintiff were rendered *during the same month*, and it appears by the admissions " que le dit " Johnson a subi son examen préliminaire, et a été renvoyé à son " procès devant la Cour du Banc de la Reine."

Such being the facts of the case, it appears to us that the undertaking of the defendant was, that in the event of the preliminary examination, upon his information, resulting in the discharge of the accused, he the defendant would pay the costs ; as in that event the government according to the letter of the 18th March, 1876, would not be liable for those costs, but that in the event of preliminary enquiry resulting in the accused being held for trial, as in that case, the costs according to the letter of the 18th March, 1876, would be payable by the government, the defendant would not be under any liability.

This view seems to be justified not only by the evidence of Mr. Genest, as to the defendant's promises, but by the impression which the witness himself seems to be under.

In one part of his deposition he says : " Le demandeur n'aurait très-certainement pas rendu les services par lui portés en son compte, si le défendeur ne s'était pas spécialement engagé à payer ces services, vu le refus du gouvernement de les payer, chose qui était connue du demandeur et du défendeur." But this statement is qualified as follows : " Ce que je viens de dire s'appliquait dans le temps à la décision du gouvernement d'après sa circulaire du 18 mars 1876, à l'effet que le gouvernement ne payait les frais encourus avant l'examen préliminaire, que dans les cas où les accusés étaient condamnés à subir un procès."

In a word we think the defendant would have been liable for the costs, if the accused had been discharged, but as the accused was not discharged, and on the contrary was held for trial, that the condition has not arrived upon which the liability of the defendant depended, and therefore that he has reason to complain of the judgment under review.

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Bell.

The judgment of the Court is as follows :

Considering that, even according to the evidence adduced by the plaintiff, the undertaking to pay costs on the part of the defendant, upon which the plaintiff relies, was to the effect, that if the preliminary examination, mentioned in the pleadings in this cause, resulted in the discharge of the accused, he the defendant would pay the said costs, as in that case, the government according to the letter of the 18th March 1876, produced in this cause, would not be liable to pay those costs, but that, in the event of said preliminary enquiry resulting in the accused being held for trial (in which case the costs, according to the said letter of the 18th March 1876, would be payable by the government) the defendant would not be liable therefor.

And considering that the said preliminary examination resulted in the party accused being held for trial, and therefore that, according to the arrangement aforesaid, under which the plaintiff's said services were rendered, the defendant is not liable to pay the said costs ;

Doth in consequence reverse the judgment rendered on the 20th November 1877 and the action and demand of plaintiff is dismissed with costs.

Judgment reversed.

Dumont & McLeod, for plaintiff.

M. McDougall. for defendant.

SUPERIOR COURT, QUEBEC.

19TH SEPTEMBER, 1878.

Coram McCORD, J.

No. 2597.

HALL *et al.*, v. ZERNICHON.

HELD :—That in an affidavit for *capias* it is sufficient to state the amount in "dollars" without any qualification as to a particular currency.

Where the initial only of Defendant's christian name is given, this is no ground of petition to quash.

That the cause of action was not sufficiently stated in the affidavit in this cause, which did not shew a personal liability of the Defendant, or the nature of that liability.

Per curiam.—This is a petition to quash a writ of *capias*, based upon the falsity and insufficiency of the allegations of the affidavit.

The two first grounds refer to the falsity, and as the petitioner has made no proof, these grounds must fail. As article 819 C. C. P., required him to *show* the falsity, the onus of proof lay upon him.

The third ground is that the affidavit states the amount due to be so many "dollars," without mentioning of what currency and that the amount of indebtedness is consequently not shewn. This ground must also fail. The word "dollar," has a generally known and accepted meaning. It is used with reference to *capias* in articles 797 and 798 C. C. P. and constantly occurs throughout the statute-book, without any qualification as to a particular currency. If the word is sufficiently clear and definite for our statutes it is also clear enough for an affidavit.

The fourth ground is that the initial only of the defendant's christian name is given. This is no ground of petition to quash *capias*. It does not allege the insufficiency of any essential allegation of the affidavit and the defendant moreover has not insisted upon it in the written remarks which he has submitted.

The three other grounds refer to the insufficiency of the statement of the cause of action which is as follows: "For "bateau hire for a certain quantity of spruce deal ends, shipped

“ to the said ship Harding, and returning charges on deals sent
 “ back from the said ship, by order of the said C. Zernichon, in
 “ the port of Quebec, during the present season of navigation.”

Hall et al.,
 v.
 Zernichon.

The petitioner contends that this statement does not show that he is personally indebted, or by whom or at whose request the bateau was furnished, or who hired the bateau, or what sum is demanded for hire of bateau or what for returning charges on deals sent back.

Certainly if it be necessary, in an affidavit for *capias*, to state a cause of action, that cause of action should show a personal liability of the defendant towards the plaintiff and the nature of that liability.

As regards the bateau hire, the objections of the petitioner are borne out by the wording of the affidavit, which in fact merely says “ for bateau hire for deal ends shipped to the Harding,” and no more, the only question is whether these objections are fatal ; in other words whether the cause of action is sufficiently stated.

I am of opinion that it is not, and the conclusions of the petition are therefore granted.

Considering that the 5th, 6th and 7th grounds of the petition are well founded, doth grant the conclusions thereof.

Capias quashed.

Sewell, Gibsone & Aylwin, for Plaintiff.

Andrews, Caron & Andrews, for Defendant.

SUPERIOR COURT, QUEBEC.

MARCH, 1878.

No. 798.

Coram MEREDITH, C. J.

ROSS vs. LEGARÉ.

Held:—That the possession of the defendant under the circumstances of the present case could not be deemed a public possession against the plaintiff, so as to support the defendant's plea of prescription.

Quære. Can an unregistered conveyance serve as the basis of a ten years' prescription against a duly registered hypothec?

Per curiam.—The plaintiff sues defendant hypothecarily, for the amount of a mortgage executed in 1861, and then duly registered.

The defendant pleads a prescription of 10 years, founded upon a title dated in 1867, but not registered until 1871; and one of the questions which this case presents, is as to whether, as against the plaintiff, the possession of the defendant can be considered public, so as to support the plea of prescription.

The facts are as follows:—

Mr. Pierre Legaré, by an obligation dated the 9th March 1861, and registered the 11th of same month, hypothecated certain real estate in favour of the plaintiff.

The real estate so hypothecated was sold by the same Pierre Legaré, to his brother Etienne Legaré, the defendant in this cause, by deed dated the 2nd June 1867; which however was not registered until the 13th January 1871.

The interest due to the plaintiff appears to have been paid until March 1875, and the present action, instituted in November 1877, is for the capital sum, with interest from March 1875.

The defendant has pleaded a prescription of ten years founded on his title of 1867.

The plaintiff contends that the possession of the defendant could not be deemed a public possession against him, and also

that the defendant's title, until its registration in 1871, could not serve, even as a basis for a ten years prescription against him, he being a duly registered hypothecary creditors.

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This case is carefully and fully argued in the written statements, which have been submitted by the learned counsel on both sides, and as I can add but little of importance to what had been said by them, I shall confine myself to a brief statement of the grounds upon which the judgment I am about to render is founded.

The evidence establishes that the defendant was in possession of the property in question, when he purchased it in 1867, and had been so in possession for several years before his purchase. Indeed from the evidence of the defendant's witness, Honoré Poliquin, the only one who speaks on the subject, it appears that the defendant's possession commenced before the year 1861, when the plaintiff acquired his hypothec. After the defendant's purchase, he continued in possession exactly as he was before. There was therefore nothing whatever connected with the defendant's purchase, to make third parties aware that a change had taken place in the ownership of the property.

If the defendant had registered his title he would have placed the plaintiff on his guard, but he failed to do so, and as the defendant thus refrained from giving publicity to the title, which characterized his possession, I do not think his possession can be considered *public*, within the meaning of the article 2193, as against the plaintiff.

The passage cited from Merlin by the plaintiff is very reasonable, and has an important bearing on this case. "Si
" suivant le droit ou la coutume on doit observer certaines
" formalités dans un acte, pour qu'il soit réputé public, il sera
" réputé clandestin, lorsque ces formalités seront omises. (1)

Troplong also in his commentary on the art. 2180 of the Code Napoléon, says :

" Il faut donc que la transcription fasse connaître aux créanciers qu'il y a eu aliénation, afin qu'ils puissent prendre les

[1] Merlin Rep. Verbo prescription, Sec. 1. S. VI. art 7 vol. 12. p. 739 2d column.

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" ver leurs droits.

"C'est dans cet esprit qu'avait été rédigé l'art. 115 de la coutume de Paris, qui voulait que la prescription ne courût pas contre les créanciers s'ils avaient eu juste motif d'ignorer l'aliénation." (1)

The learned counsel for the defendant has drawn our attention to article 2180 of the code Napoléon, which provides: " Dans le cas où la prescription suppose un titre, elle ne commence à courir que du jour où il a été transcrit sur les registres du conservateur.

It is said, as I understand, that our code contains no provision such as that above cited, and that in the absence of such a provision, our code, as to the matter in controversy, cannot produce the same effects as are produced by the provision just cited of the Code Napoléon.

It is to be observed however that the Code Napoléon although it required the registration of privileged and hypothecary rights, did not require the registration of deeds transferring the ownership of real estate, such as conveyances.

In consequence of this omission, which was admitted and deplored by the most esteemed Jurists, (2) and which has since been remedied, (3) in cases of prescription founded on title, the title could not under the Code Napoleon, be expected to be found on the register. It was seen that, in this way, hypothecary creditors could not have that protection which under the code it was intended that they should have, and hence the special provision of art 2180, that a prescription founded on title could run only from the registration of such title.

This is well explained by Troplong. " La transcription re

(1) Troplong. Priv. and Hyp., vol. 4, p. 58, No. 883, last paragraph.

(2) Troplong Priv. and Hyp. preface Ed. of 1835, p. 38 and 39; Ed. of 1854 p. 28. Duranton Ed. of 1834, vol. 19, p. 21, No. 17. Puzel Reg. Hyp. p. 6.

(3) Law of March, 1855, Aubry and Rau, 2d vol. p. 284. Rivière & François, p. 11.

“ quise par notre article ne se lie en aucune manière à la transmission de la propriété entre les mains de l'acquéreur. On convient que sans la transcription, l'acquéreur est pleinement et parfaitement propriétaire. La transcription n'est ici demandée que pour avertir les tiers, créanciers hypothécaires, que l'immeuble affecté à leur hypothèque a changé de main.” (1)

But our registry system is as imperative with respect to the registration of titles and conveyances, as it is with respect to the registration of privileged and hypothecary rights.

There was, therefore, no necessity in our code for a special provision respecting the ten years' prescription founded on title, such as is to be found in art. 2180 of the code Napoléon.

The learned counsel for the defendant has also cited authorities establishing that under the code Napoléon, the defendant meeting a petitory action by a prescription of ten years, need not prove the registration of the title, upon which the ten years' prescription is founded, although the ten years' prescription against an hypothecary action could run from the registration of the defendant's title only. (2)

This anomaly under the code Napoléon is I think mainly attributable to the omission in that code already adverted to. But it may be added that in so far as regards the ends of justice, there is much more reason for requiring registration between an hypothecary creditor and a defendant claiming by prescription, than there is for requiring registration as between two persons claiming the same property.

For instance if in the present case the plaintiff claimed not a hypothec but the property itself, the defendant might reasonably say to him : although you claim to be the owner of the property which I hold, you have not during the last ten years received any part of the rents issues and profits of it, nor exercised any proprietary right in relation to it ; on the contrary you have left me in continued and undisturbed possession for more than ten

(1) Troplong P. & H., vol. 4, No. 883.

[2] Bivière and François, page 40, No. 39.

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years since I purchased, I therefore had a right to consider the property as mine, and you for your negligence deserved to lose it.

But the present plaintiff, claiming as a mere hypothecary creditor, cannot be met by any such statement.

The plaintiff was not entitled to the possession of the property, nor to the rents, issues and profits of it. And the possession of the defendant did not seem to militate against his rights. All that the plaintiff was entitled to, was the interest upon his capital, and that appears to have been paid so long as the defendant's title was not registered ; and for some years afterwards. Thus the plaintiff in this case, is not chargeable with any negligence, which the law could regard as sufficient to defeat or impair his rights.

It is beyond doubt, that a possession may, in contemplation of law, be public as against one person, and yet be clandestine against another. And if in the present case the plaintiff were suing as proprietor, it is possible that the defendant's possession ought to be deemed public, because that possession, as it would have wholly excluded the plaintiff from the enjoyment of his property, ought to have sufficed to put the plaintiff on his guard, but it had no such tendency as against the present plaintiff, a mere hypothecary creditor ; and, therefore, ought not to be deemed sufficient, or public, as regards him.

It was also very strenuously contended by the learned counsel for the plaintiff, that under the general provisions of our registry law, and more particularly under articles 2082, 2083 and that part of article 2130, which declares that real rights rank according to the date of their registration, the title of the defendant, so long as it was unregistered, could not be effectual, as a basis of a ten years prescription against the plaintiff's duly registered hypothec. This contention seems to me very reasonable, and is fully borne out by the observations of some of the members of the Court of Appeals in *Lalonde v. Lynch*, cited by the plaintiff. In that case Mr. Justice TASCHEREAU, is reported to have said : " Le nouvel acquéreur est toujours devenu propriétaire, même par le seul consentement, suivant l'article 1472 du " code civil ; *mais il ne peut prescrire, il ne peut vendre ou hypo-*

“ théquer l'immeuble au détriment de ses créanciers, ni de ceux
 “ de son auteur, etc., etc., 20. L. C. Jur. p. 162.”

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It is not necessary for me however to adjudicate upon the second contention, thus submitted by the plaintiff, being of opinion that the defendant's possession cannot be deemed public as against the plaintiff. The plea of prescription will therefore be rejected, and judgment will be in favor of the plaintiff as prayed.

Judgment for Plaintiff.

Andrews, Caron & Andrews, for Plaintiff.

Drouin, for Defendant.

SUPERIOR COURT, QUEBEC.

19TH SEPTEMBER, 1878.

Coram McCORD, J.

HUNT *et al.*, v. CORPORATION OF QUEBEC.

Action to annul as illegal a by-law imposing a special tax. Plea, to the form, that Plaintiffs should have proceeded under article 997, C. C. P., inasmuch as they charged in effect that the Corporation defendant, had exercised powers not conferred upon it by law :

HELD :—That the remedy provided by article 997 C. C. P., did not deprive the plaintiffs of their right at common law to bring the present action in their own name. Any person may seek redress before the tribunals of the country against Corporations by whose acts his rights or property may be injuriously affected, or by whom he may be in any way aggrieved, in the same manner and to the same extent as he could do so against individuals under similar circumstances.

Per curiam.—This is an action to set aside a by-law of the corporation of Quebec, (6th April, 1877,) by which a special tax of 5cts. in the dollar is imposed on the assessed annual value of

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the immoveable property of Quebec to meet certain debts of the corporation of that city.

The plaintiffs allege :

That they are owners of large properties in Quebec, of great value and liable for all taxes legally imposed.

That the corporation passed the by-law which is recited in the declaration.

That this by-law was passed without the observance of the formalities required by law.

That no law authorises the passing of the by-law in question or the imposition of the tax therein mentioned.

That the corporation never took the legal means it was bound to take in order to meet the debts to pay which the said tax is imposed.

That the corporation in their expenditure have exceeded their appropriations, have issued bonds beyond the amount authorised, and have misapplied the proceeds of bonds to other purposes than those to which they were legally applicable.

That if the corporation had kept their expenditure within lawful limits, they would have had funds in hand to pay the debt for which the special tax is sought to be imposed by the by-law in question.

This action is met by an *exception à la forme*, the first three grounds of which refer to want of explicitness and detail in the plaintiff's allegations.

Whatever weight these grounds might have in ordinary cases between individuals where more explicitness might be required in order to enable the defendant to plead effectively, I am of opinion that the allegations are sufficiently detailed as against a corporation which is bound to be prepared at any time to show the legality of all its acts, whether these acts are specially alleged in a declaration or not. The defendants moreover have not insisted upon these grounds at the argument.

The *exception à la forme* therefore rests in reality upon the fourth ground, which is to this effect. That the declaration alleges that the corporation has exercised powers not conferred upon it by law and that according to these allegations the plaintiffs should have proceeded under article 997 C. C. P., and that the present action cannot therefore be maintained.

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This article provides that whenever a corporation exercises a power which is not conferred upon it by law, or does not belong to it, it is the duty of the attorney-general in cases of public general interest to prosecute, if he has reason to believe that there is sufficient proof; but he is not bound to do so in other cases unless security is given to indemnify the government against costs.

The question therefore is, were the plaintiffs obliged to proceed under this article of the code? in other words:

1° Had the plaintiffs a right at common law to bring their present action? and, if so,

2° Are they deprived of that right by 997 C. C. P., or any other law?

For my part I see no possible reason why a person should not be free against corporations by whose acts his rights or property may be injuriously affected, or by whom he may be in any manner aggrieved, to seek redress before the tribunals of the country in the same manner and to the same extent as he could do so against individuals under similar circumstances.

In the case of *Molson v. The Corporation of Montreal* which has been cited by the defendants and to which I shall hereafter refer, the Hon. Chief Justice DORION appears by the printed copy of his notes handed in by the defendants, to have expressed his opinion to the effect that: "Whenever a corporator can establish that he is suffering an actual injury or prejudice from the unauthorised acts of a corporation, he is at liberty to seek a remedy by an action in his own name, without the intervention of the Attorney-General," Mr. Justice RAMSAY in his remarks upon the same case as printed and placed before me fully recognises this common law right.

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Quebec. It is also recognized in the cases of *McDougall v. The corporation of St. Ephrem d'Upton* and *Stephens v The corporation of Montreal*

In the Molson case the legality of the decisions in *McDougall v St. Ephrem* and *Stephens v, Montreal* is not questioned, but it is argued that in these cases the plaintiffs did not assume to act in the general interest of the community as they only sought to prevent the sale under execution of their lands seized for taxes illegally imposed, and the expressions of Mr. Justice TORRANCE, on the occasion of an application being made to him in the Molson case are cited as follows: "In the case of Stephens the "proceedings taken by the individual were not to check the "progress of the city as is attempted in this instance, but merely to prevent his property from being sold."

Now I imply from this that both these decisions and the opinion of Mr. Justice TORRANCE recognise the right of the individual to attack a by-law in defence of his own personal interests. and I take these decisions as supporting the position of the plaintiffs in this case. I do not however think that I would take the "checking of the progress of the city," as a ground of distinction between these two cases and the present one, to say nothing of the Molson case. Because if EVERY proprietor taxed has a right, according to these decisions, *to prevent his property from being sold* on the ground of the illegality of the by-law, the progress of the city could be as effectually checked as by a direct action to annul the by-law.

Holding therefore that the right exists at common law, I come to the second question as to whether it has been taken away by legislation.

The pretension of the defendants which results from their exception is that article 997 C. C. P., prescribes the only mode by which the plaintiffs could have proceeded, but I am far from thinking that the terms of that article justify any such pretension, on the contrary I fully concur in the opinion which Mr. Justice RAMSAY appears to have stated in the case of *Molson v. the Corporation of Montreal*, namely that "article 997 C. C. P. only "lays down a rule for the Attorney-General but in no way "affects the common law right of each individual to protect himself by action against the wrong doing of the corporation."

In my opinion the article in question is chiefly intended to indicate the mode of procedure for the protection of *public interests*, whenever they are injuriously affected by the acts of corporate bodies. It only makes it the duty of the Attorney-General to take proceedings (when he is satisfied as to the proof) *in cases of public general interest*.

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It is true that it likewise says: "that he will also be bound to do so in other cases, if sufficient security is given to indemnify the government against costs," but there is nothing in this to oblige any person to give such security or to have recourse to the Attorney-General for the purpose of exercising any right of action which belonged to him individually, by reason of a wrong he may personally have suffered at the hands of a corporation; much less can any implication be drawn from this portion of the article, that would deprive an individual of his common law right in such cases.

Mr. Justice SANBORN according to the printed copy of his notes of judgment in *Molson v. Corporation of Montreal* which has been placed before me on behalf of the defendants says; "do have a remedy in any form in his own name, the appellant must show an individual interest *not common to the whole electoral constituency*." I would willingly concur in this as a legal proposition according to my interpretation of it, I admit that if the plaintiffs had no other interest than an *undivided* one, *common* to the whole constituency, they should be obliged to join with the other members of that constituency, who held that interest undividedly and in common with them, for in such a case the matter is one of *general interest alone* and the propriety of the suit being instituted in the name of the attorney general is readily understood, in the present case, however the plaintiffs allege a distinct individual interest proportionate to the stated value of their assessable property and their interest is none the less distinct, special and personal because other persons of the same class have likewise a similar individual interest.

Reasons of expediency have been given in the case alluded to, such as the avoidance of a multiplicity of actions by many corporators against the corporation, but practically this inconvenience is not to be dreaded, because when a suit has been properly instituted by one corporator, the others who are similarly

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interested, are not likely to rush before the courts unless forced to do so by the corporation itself, and practically, the suit thus first instituted, if it were not literally and in law a test suit, binding upon all, such as mentioned in Mr. Justice SANBORN'S notes, would as a matter of fact answer the same purpose. Another reason *ab inconvenienti* which was strongly urged in the Molson case, as would appear by the factum of the respondents, is that such actions interfere with general municipal progress and impede the proper administration of municipal affairs; the answer to this is :

That the private rights of citizens are presumed to be as sacred and important in the eye of the law, as those of the municipality generally, and if arguments *ab inconvenienti* could have any weight in judicial decisions, that weight in these days when the administration of municipal affairs is not in the highest repute might perhaps be made to lean more justly in favor of the citizen than of the corporation.

Reasons of expediency however and arguments *ab inconvenienti* come more properly within the scope of legislative than of judicial powers and duties.

It would also appear from the respondents' factum in the Molson case, that they relied upon article 698 of the municipal code, as implying that the common law right of an individual to bring such an action as this against a corporation did not exist, as otherwise there would have been no necessity for this article, but it is only necessary to read it attentively to notice that it does not refer to the Superior Court (the only court which by law has general superintending and reforming power and control over bodies corporate), and merely gives every municipal elector a right to bring such an action as the present one before the *Circuit Court* or a *Magistrates Court*.

Here therefore is an extension instead of a restriction of the commonlaw right and the deduction from it is in favor of the plaintiffs and not of the defendants in this case.

Coming now to the arguments and decisions in the Molson suit as applicable to the case now before me I would remark that these cases differ in a very important particular, which

seems to have influenced more than any other consideration the decision given against Mr. Molson.

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In that case the by-law complained of, had not yet become operative. It was argued that the wrong had not been fully perpetrated, against which redress was sought, and the action was therefore deemed premature. In the present case the by-law complained of is final and it imposes a tax which by mere operation of law affects and becomes an incumbrance upon the property of the plaintiffs, and a wrong has been done, if as alleged the by-law is illegal.

Another difference between the Molson case and the present one is that, as regards the former, the by-law to which it refers was declared valid by the 36 Vict., ch. 49, which was passed after the institution of the action and formed one of the grounds upon which judgment was given against the appellant Molson.

Except therefore in so far as the decision in that case may have been based upon the inability of the plaintiff to sue in his own name, without the assistance of the Attorney-General, it is not applicable to the present suit, and even on that point both the Chief Justice and Mr. Justice RAMSAY, expressed the opinion that Mr. Molson had a right to sue in his own name. Upon the whole I am against the pretensions of the defendants, and their exception *à la forme* will therefore be dismissed.

The Court, &c. Considering that the allegations of the plaintiffs' declaration, are on the whole sufficiently explicit to enable the defendants to defend themselves, and to establish if they can the legality of the by-law complained of.

Considering that the said declaration sets forth sufficiently, that the defendants illegally passed a by-law imposing a tax on the property of the plaintiffs.

Considering that by law the tax so imposed created an incumbrance upon the property of the plaintiffs and that a good cause of action is sufficiently set forth.

Considering that at common law the plaintiffs had a right to bring an action in their own name to set aside the said by-law,

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and that they are not deprived of that right by article 997 C. C. P. or any other law.

Doth dismiss the exception *à la forme* of the said defendants with costs.

Holt, Irvine & Pemberton, for Plaintiffs.

Baillairgé, Q. C., for Defendants.

SUPERIOR COURT, QUEBEC

19TH SEPTEMBER, 1878.

No. 273.

Coram McCORD, J.

BOUCHARD v. DAWSON.

HELD :—That a writ of *feri facias*, which has been stopped by an opposition to annul, in a cause the record of which has been destroyed by the Quebec Court House fire, is not an *ex parte* proceeding, even though the judgment was obtained *ex parte*, and that, consequently, the plaintiff cannot renew his proceeding under sec. 5 of Q. 37 V. c. 15, but must obtain the restoration of the record, or procure leave to proceed under sec. 7 of that act.

Per curiam.—This case comes before me upon an opposition *afin d'annuler*, filed by the defendant.

On the 9th April, 1870, the plaintiff obtained judgment for \$490.00, and costs.

On the 30th January, 1871, he issued a *feri facias de bonis et lerris*, under which certain chattels and real property of the defendant were seized in execution.

The further execution of this writ was prevented by means of an opposition *afin d'annuler*, filed by the defendant, which was returned by the sheriff, together with the writ, on the 11th February, 1871.

In February, 1873, the Quebec Court House was destroyed by fire.

On the 24th August, 1874, the plaintiff notified the defendant that he had caused an authentic copy of the judgment aforesaid, to be registered in the Superior Court, and on the 18th August, 1876, he caused to be issued another *feri facias de bonis et terris*, under which a second seizure was effected, which is also met by an opposition *afin d'annuler* on behalf of the defendant.

The grounds of this opposition are : 1° That the previous writ and opposition are still pending and undetermined ; 2° That the opposant had compromised for the amount of the said judgment, and had paid the amount of the compromise.

The plaintiff meets this opposition ; 1st. By a *défense en fait* ; 2nd. By a plea alleging that the first writ of execution and the opposition thereto, together with the remainder of the record in this cause, were destroyed by the court house fire, and that by law the plaintiff had a right to cause a second writ to be issued, against which the defendant cannot legally plead the pendency of the previous one.

As the question raised by this exception should, in my opinion, be decided adversely to the pretensions of the plaintiff, it will be my duty to maintain the first ground of the defendant's opposition, which is sufficient of itself, to justify his conclusions, and I need not adjudicate upon the other grounds.

The act 87, Vict., ch. 15, provides for the restoration of records destroyed by the burning of the Quebec court house, and, in this case, the plaintiff has taken no proceedings to have the record restored.

It is true that section 5 of the Statute, enacts that in any *ex parte* suit or proceeding, in which the record has been destroyed by the said fire, the plaintiff may bring a fresh action, but in this case, I do not consider that a writ of *feri facias*, which is met by an opposition, is an *ex parte* proceeding, even though the suit itself up to judgment, may have been *ex parte*. Here the defendant was certainly contesting the proceeding of the plaintiff, and an issue was raised between the parties, even though that issue may not have been completed. I cannot believe that such a case as this, was ever intended to be covered by this 5th section of the Act.

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Section 7 of the same act provides that in any proceeding pending, the record of which has been destroyed by the said fire, a judge may on petition of any of the parties, after notice to the others, permit such party to recommence such proceeding, provided it be not shown that any other party will thereby suffer injustice, and that it is possible to restore the record.

The plaintiff in my opinion should have proceeded under this section, if he wished to recommence without restoring the record, but he has not thought proper to do so.

Sec. 20 of the act says that the pendency at the time of the fire, of a proceeding, the record of which has been destroyed, shall be no answer to a fresh proceeding *instituted under the provisions of that act*. Clearly therefore the proceeding could only be renewed *under those provisions*.

I therefore conclude that the proceedings upon and connected with the *fieri facias* of 30th January, 1871, are still pending, and that the plaintiff must either obtain the restoration of the record or proceed under section 7, if he is entitled to do so.

The judgment is as follows :— “ The Court, &c.

“ Considering that the issuing of the writ of *fieri facias* in this cause, on the 30th January, 1871, and the filing of an opposition thereto, returned into court on the 11th February following, did not constitute an *ex parte* proceeding, but on the contrary formed a contested one ;

“ Considering that the said proceeding was pending at the time of the destruction of the Quebec Court House by fire ;

“ Considering that the plaintiff has neither taken proceedings to have the record in this case restored, nor obtained leave from a judge of the Superior Court, under the provisions of the act of Quebec, 37 Vict., ch. 15, sect. 5, 7, 20, to recommence his proceeding by writ of *fieri facias* ;

Doth maintain the said opposition of the defendant, opponent, and declare null and void the writ, seizures and proceedings in this cause made and had, under the writ of execution

issued in this cause on the eighteenth day of August, 1876, and doth grant to the opposant *main levée* of the said seizures, the whole with costs *distracts*, &c.”

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Pawson.

M. Chouinard, for Plaintiff.

C. T. Suzor, for Opposant, (Defendant.)

SUPERIOR COURT, QUEBEC.

19TH SEPTEMBER, 1878.

Coram McCORD, J.

LAFLAMME, Attorney General, *pro Regina* v. PRENDERGAST

HELD:—That a suit for fees for the measuring of timber by licensed cullers acting under the supervisor of cullers at Quebec, pursuant to C. S. C., ch. 46, is properly brought in the name of the Crown.

Per curiam.—This is an action by the Attorney General for Canada *pro Regina*, demanding \$21.01 for the measuring of several pieces of birch timber, by licensed cullers, acting under the Supervisor of Cullers in Quebec, pursuant to C. S. C., ch. 46.

The defendant has pleaded the general issue. The indebtedness is fully proved, the only question being one raised at the hearing on the merits, and that is as to whether the suit is properly brought in the name of the crown, and should not have been instituted by the Supervisor of Cullers.

The defendant cited section 29 of ch. 46, C. S. C., which enacts that the fees for culling shall be charged and collected by the Supervisor.

I do not consider the words of this clause sufficient to authorise the supervisor to bring an action for public moneys in his own name. The power to collect does not necessarily include the right of suing in his own name; but, even if it did, it would not follow that an action could not be brought directly in the

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Prendergast name of the crown. These fees for culling, although the law provides for their special application to the payment of work done by cullers, and other expenses, are none the less public moneys. The supervisor, who is himself a salaried officer, is accountable for them to the government, and I am of opinion, therefore, that this action is properly brought in the name of the crown.

“ The Court, &c.

“ Considering that the plaintiff has proved the material allegations of his declaration, that the action is for the recovery of public moneys, and is therefore properly brought in the name of the crown ;

“ Doth condemn the defendant to pay to Her Majesty, as represented in this cause, the sum of \$21.01 with interest and costs of suit.”

Remillard & Flynn, for Plaintiff.

Bossé & Languedoc, for Defendant.

SUPERIOR COURT, QUEBEC.

19TH SEPTEMBER 1878.

No. 1776.

Coram McCORD, J.

DÉRY v. FABRE.

Held :—That it is no defence to an action for libel to say that the defendant, a newspaper proprietor, must give his readers all the information he can on public matters, or that what was said of the plaintiff formed part of a general report of the proceedings at a nomination, or that scenes of violence took place at such nomination concerning which the public was desirous of being informed, or that the article had to be written in haste, or that the information obtained was from persons worthy of belief, or that the article was written with the sole object of giving information to the public in the manner usually practised by newspapers generally, or, that the plaintiff had not demanded a rectification from the defendant.

Per curiam.—This is an action of libel.

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Fabre.

The plaintiff, at the time of the action, was a practising advocate, and the defendant, editor and proprietor of the newspaper *l'Événement*.

The libel complained of consists in the publication, in *l'Événement* of 23rd January, 1874, of a certain report of an election nomination at Levis, at which scenes of violence had occurred, comprising the following words as applicable to the plaintiff: "Il y avait encore un Monsieur R. P. Vallée et un M. Elz. Déry, "avocat, qui eux présidaient à la distribution des bouts de fer et "des glaçons."

The defendant has filed a plea of general denial, and by perpetual exception, pleads that there was no malice on his part, nor intention to injure or offend the plaintiff; that he afterwards published a rectification, and that he was always ready to bear testimony to the plaintiff's good reputation and to undo through his paper any damage he may have caused the plaintiff.

In the same plea the defendant alleges several other grounds which, after being demurred to by the plaintiff, were rejected from the plea by His Honor Mr. Justice CASAULT.

The judgment rejecting these grounds, I fully concur in, for the simple reason that, admitting some of them to be proved, they would be no defense to the action, and that the others are mere matters of argument and not of plea.

It is no defense, for instance, to say that the defendant must give his readers all the information he can on public matters, or that what was said of the plaintiff formed part of a general report of the nomination at Levis, or that scenes of violence took place at the nomination, concerning which the public was desirous of being informed, or that the article had to be written in haste, or that the information obtained was from persons worthy of belief, or that the article was written with the sole object of giving information to the public in the manner usually practised by newspapers generally, or that the plaintiff had not demanded a rectification from the defendant.

All these grounds, even if proved, would not prevent the defendant from being responsible for the truth, at least, of every

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disparaging word he published in his journal regarding, any individual.

The liberty of the press consists in this, that any man may publish what he pleases, without being prevented or restricted by previous censorship or other authority, but it does not free him from responsibility for the consequences of such publication. He is still responsible for *all* his acts. It would indeed be an anomaly, if a man could be held responsible for what he has *said* of another, and could shield himself under the liberty of the press for what he has *written* of him.

All the material facts in the case are either admitted or proved, and it only remains for me to examine into the gravity of the libel, the sufficiency of the defendant's rectification of it, and the damage suffered by the plaintiff.

The mere publication in the "Événement" of the fact that Mr. Vallée had informed the defendant that the plaintiff was not present at the nomination, was not a retraction, much less was it an apology, nor was it even the admission of an error committed.

The plaintiff, however, whatever pain the publication in question may have caused him, does not appear to have suffered from it in the estimation of the public, nor as he alleges in his declaration, does he seek to make a speculation out of the action he has instituted.

It is difficult in such cases to appreciate damages, but I think that, under all the circumstances, the principle will be vindicated and the ends of justice attained, by giving the plaintiff judgment for \$50.00, damages, and costs.

"The Court, &c.

"Considering that the plaintiff has proved the material allegations of his declaration, and that the allegations of the defendant's exception, even if proved, are no justification of the libel published by him ;

Doth condemn the said defendant to pay to the plaintiff, the sum of \$50.00 with costs."

Cloutier, for Plaintiff.

Langelier & Langelier, for Defendant.

COUR DU BANC DE LA REINE—AU CRIMINEL.

QUÉBEC, 14 NOVEMBRE 1878.

Coram TESSIER, J., CROSS, J.

DELISLE ET FORTIN.

Juré :—Qu'en vertu de la 37 Vict., ch. 45, sec. 87, nul autre que l'inspecteur des cuirs n'a droit d'apposer sur le cuir une estampe indiquant la mesure superficielle de chaque pièce, lorsque tel cuir est pour être mis en vente.

Que dans la cause actuelle, une contravention à la dite section n'a pas été prouvée contre le Défendeur.

Le juge TESSIER prononce le jugement comme suit :

Cette cause se présente sur un appel d'un jugement rendu par le juge des Sessions de la Paix à Québec, le dix-neuf janvier 1878, en vertu duquel George Delisle l'appelant, a été condamné à payer une amende de \$10.00 avec dépens, pour avoir le 3 septembre 1877, illégalement estampé et offert en vente un côté de cuir, en y indiquant la mesure superficielle du dit côté de cuir. Cette offense se trouve indiquée dans la section 89 du Statut du Canada, 37, Vict., ch. 45, qui défend à tout autre excepté l'inspecteur, à peine d'amende, de mettre sur le cuir une estampe marquant la mesure superficielle.

En vertu des Statuts de 1869, 32-33^e Vict., chap. 31, section 65, un appel d'un jugement de cette espèce pouvait être porté devant la Cour des Sessions trimestrielles de la Paix ; mais cette section a été rappelée en 1877 par le Statut 40 Victoria, chap. 27, et amendée de manière à donner l'appel à la Cour du Banc de la Reine siégeant au Criminel.

C'est de cette manière que le présent appel a été porté devant cette cour.

Il est nécessaire de remarquer qu'en vertu de la section 66 du Statut 32-33 Vict., chap. 31, il est pourvu à ce que les mêmes témoins qui ont été interrogés dans la cause originaire devant le juge des Sessions de la Paix, soient examinés de nouveau devant la Cour qui siège sur l'appel ; il suit de là que la cause doit être décidée en appel non pas absolument sur la preuve qui a été faite

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en premier lieu, laquelle n'est pas d'ailleurs rapportée ici, mais suivant la preuve qui a été faite devant cette cour ici siégeant.

Pour constituer l'offense il faut que les deux éléments de l'estampage et de l'offre en vente, se trouvent réunis. C'est là ce que veut le Statut 37 Vict., chap. 45, section 87. Or il a été prouvé qu'un certain côté de cuir ainsi estampé dont un morceau a été produit, a été offert en vente et même vendu le 3 septembre 1877, à Québec, à la date et au lieu indiqués dans la plainte, non pas par l'appelant George Delisle, mais par une autre personne, savoir : par Félix Gourdeau, dans le magasin ou la boutique de ce dernier. Léon Racine, témoin de la part de la poursuite, dit : " Le morceau de cuir dont un morceau est produit a été vendu " par Félix Gourdeau à David Turgeon ; il n'appartenait pas à " George Delisle, mais au dit Félix Gourdeau : il a été ainsi " vendu du 4 au 6 septembre 1877. Ce cuir appartenait originai- " rement à Félix Gourdeau, et avait été envoyé chez George " Delisle pour être corroyé, et il a été ainsi corroyé et marqué par " George Delisle pour le compte de Félix Gourdeau."

Il est vrai qu'il est prouvé que trois ou quatre semaines avant le 3 septembre 1877, George Delisle a estampé du cuir à lui appartenant, et l'a fait offrir en vente pour son compte au magasin de Gourdeau. La date précise de l'offense n'est pas essentielle, et s'il eut été établi que le morceau de cuir qui a été produit avait été estampé et vendu le 10 août au lieu du 3 septembre par le défendeur George Delisle, celui-ci n'eut pas échappé à la pénalité, car cette cour est d'opinion que l'estampage en marquant la mesure superficielle par un autre que par l'inspecteur ou son député est une contravention à la loi.

La preuve établit autre chose, c'est que la contravention à la loi, dont on se plaint, a été commise par une autre personne, et cette cour ne peut pas en ce cas confirmer la sentence. La cour est au contraire obligée d'absoudre le défendeur de l'offense contenue dans la plainte.

En conséquence, cette Cour infirme la conviction ou sentence rendu par le juge des Sessions de la Paix à Québec, le dix-neuf janvier 1878, contre le dit George Delisle, mais sans frais.

F. X. Drouin, Procureur de l'Appelant.

Mackay & Turcotte, Procureurs de l'Intimé.

SUPERIOR COURT, QUEBEC

SEPTEMBER, 1878.

Coram McCORD, J.

MOTZ v. PARADIS.

The Plaintiff alleged the sale of a beach lot to Defendant, and that Defendant after taking possession of the lot refused to sign the Deed of Sale or to pay the interest on the price as agreed, to the damage of Plaintiff, who was thereby prevented from effecting a favorable sale to another, and Plaintiff concluded, 1. for \$525. damages, 2. for the return of the lot to him in default of defendant's executing the deed and paying the interest. Demurrer. That Plaintiff alleging a complete sale to defendant, could not claim damages for not having been able to sell to another; nor could he demand to get back the lot without first obtaining a rescision of the sale; nor could Defendant therefore be condemned to the alternative. **HOLD:**—That the general allegation of damages resulting from Defendant's refusal to sign the Deed was sufficient to support the conclusion for damages, and such general allegation was not to be considered as restricted by the statement that Defendant's said refusal had prevented a favorable sale to another.

Per curiam.—The plaintiff alleges that he was owner in June 1876, of a certain beach lot; that on the 17th of that month, defendant bought the lot from him for \$500, payable in 10 years with interest at 5 per cent payable yearly; that a writing to that effect was drafted by the plaintiff, and taken to a notary by defendant, who gave instructions to have a notarial act drawn up, stating at the time that he would call on the next or following day to sign it; that a deed was drawn up, but defendant refuses to sign it, and also refuses to pay the interest; that defendant took possession of the lot, and that he the plaintiff, in consequence of such refusal, has suffered and is suffering damages, ("*ayant perdu l'occasion de vendre le dit lot dans un temps favorable,*") to the amount of \$525. He then demands acte of his willingness to fulfil his part of the alleged agreement and concludes: 1° For \$525 damages; 2° That the lot be returned to him, unless the defendant prefer signing and registering the deed and paying \$25 for one year's interest.

The *défense en droit* substantially says to the plaintiff: You allege a complete sale of the lot to me, therefore you cannot claim damages for not having been able to sell it to another, nor can you demand to get back the lot, unless you first obtain the

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rescission of the sale, nor can I therefore be condemned to the alternative.

These propositions of the defendant, as stated in his plea, appear to be sound, but how do they apply to the declaration ?

The plaintiff alleges an undertaking to sign a certain deed and to pay certain interest and a refusal to do either, and that "*vu ce refus*," he has sustained damages. It is true that he adds "*ayant perdu l'occasion de vendre le dit lot dans un temps favorable*," but I do not think that this addition is restrictive of the general allegation of damages as resulting from the refusal of the defendant, especially as regards the \$25 interest.

His premises justify at least part of his conclusions and his declaration is therefore sufficient, *pro tanto*, if not for the whole.

JUDGMENT :

Considering that the plaintiff alleges in his declaration that the defendant undertook to sign a certain deed and to pay certain interest, and afterwards refused to do either, and that he the plaintiff has in consequence suffered damage ;

Considering that the said allegations are sufficient to justify his conclusions for damages and to form the basis of a judgment for such damages if proved, even though the allegations of his declaration may be insufficient to justify the other conclusions thereof, the defendant's demurrer is dismissed.

Blanchet & Pentland, for Plaintiff.

Belleau, Durveau & Stafford, for Defendant.

COUR SUPÉRIEURE, QUÉBEC—EN RÉVISION.

3^o AVRIL 1878.*Coram* MEREDITH, J. C., STUART, J., CARON, J.CLARKE *v.* LORTIE *et al.*

ACTION PAULIENNE—FRAUDE.

Lortie devait à Clarke \$177.71. A la veille d'être poursuivi, il vend sa maison à Allard son gendre, lequel connaissait l'existence de la dette. JUGÉ.—Que la vente en question est frauduleuse.

Les défendeurs s'inscrivirent en révision, contre un jugement de la Cour Supérieure, Québec, rendu le 11 mars 1878, comme suit :

MCCORD, J.—Action Pauliana to rescind a sale by defendant Lortie, to his son in law, Pierre Allard, the other defendant.

It is proved in this case that the defendant Lortie is the father in law, of the defendant Allard ; that Allard was in the habit of doing business for Lortie, and knew before the passing of the Deed impugned, that Lortie, was indebted to the Plaintiff ; that Lortie with the exception of a few dollars, worth, had no other property than what he sold by the deed in question, and was in fact insolvent. It also appears from the proof of the plaintiff, and the absence of proof on the part of the defendants, that Allard knew this, and finally the Defendants themselves admit that Lortie ever since the sale, has continued in possession of the property thus sold to his son in law, not only without paying rent, but even without having agreed to pay any.

All this is sufficient in my opinion to establish a legal presumption of fraud and simulation against both defendants, especially in the absence of proof of the employment of the money, which the deed mentions as having been paid, or in fact of any proof whatever, on the part of the defendants. The action will therefore be maintained and the Deed set aside with costs.

M. Chouinard.—Les défendeurs croient que ce jugement n'est

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pas justifié par la preuve, et en demandent maintenant la révision.

La preuve du demandeur consiste dans les témoignages d'un nommé Napoléon Côté, de Québec, et des défendeurs Allard et Lortie.

Le témoin Côté dit que le défendeur Allard faisait les affaires du défendeur Lortie, mais que Allard ne lui a jamais parlé des affaires de Lortie ; excepté deux ou trois fois, où Allard a dit à lui, le témoin Côté, que Lortie devait au demandeur Clarke. Quand Allard a-t-il dit cela au témoin Côté ? L'époque n'est pas prouvée. Quelles affaires Allard faisait-il pour Lortie ? où ? à quelle époque ? On n'en sait rien.

Dans l'humble opinion des défendeurs, il ne résulte aucune preuve quelconque du témoignage de Côté, et c'est donc uniquement dans les témoignages des défendeurs qu'il faut aller chercher la preuve de l'action.

La preuve faite par l'un des défendeurs ne peut lui servir à lui-même, mais elle peut servir à l'autre défendeur. Or, quels sont les faits prouvés par Allard ? Les voici en substance :— Depuis neuf à dix ans il prête de l'argent et avance des effets à Lortie, son beau-père, et Lortie le paie au fur et à mesure qu'il peut payer. Lortie est honnête homme, et Allard n'a pas craint de perdre avec lui.

Allard a été entendu comme témoin en février 1878, et il dit qu'environ dix-huit mois auparavant, Madame Lortie lui a appris qu'elle devait au demandeur. Elle a commissionné le défendeur Allard de prier M. Clarke de vouloir bien l'attendre, et qu'elle lui enverrait de l'argent au plus vite possible. Allard pense bien que Lortie n'a pas d'autres biens que la maison mentionnée en l'acte de vente.

Lortie, lors de la vente, devait \$91.00 et les intérêts de quatre ou cinq ans. Vers février 1875, Madame Lortie avait aussi dit au défendeur Allard de demander à M. Clarke de ne pas se décourager, ou de l'attendre un peu. Lortie occupe encore la maison vendue, sans payer loyer. Allard a acheté cette maison pour se payer.

Il n'y a dans ce témoignage du défendeur Allard aucune preuve d'intentions frauduleuses de sa part, ni de la part du défendeur Lortie. Clarke
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Le fait que Lortie occupe encore la maison vendue à Allard ne crée ici aucune présomption de malhonnêteté, puisque le contrat de vente est onéreux. Si la vente est bonne et légale, Clarke ne peut se plaindre de ce que Allard accorde à son beau-père Lortie l'aide et le secours que tout enfant doit légalement à ses parents. M. Clarke pourrait plutôt se plaindre si Lortie payait loyer à Allard, puisque les dépenses de Lortie seraient augmentées d'autant, et ses moyens de payer diminués d'autant.

Mais si le témoignage du défendeur Allard ne peut lui servir à lui-même, ses réponses aux interrogatoires sur faits et articles peuvent lui servir. Le demandeur n'ayant pas déclaré qu'il ne s'en servait pas, elles sont donc admises en preuve. Or, il y jure positivement que lorsqu'il a acheté la maison en question, il ne connaissait pas l'insolvabilité du défendeur Lortie;—qu'il ne connaissait pas l'état de ses affaires;—et qu'il a bien payé en argent le prix de vente de cette maison. Et il n'y a dans tout le reste de la preuve rien pour contredire ou pour affaiblir cette affirmation positive du défendeur Allard. Au contraire elle est confirmée par les réponses du défendeur Lortie aux interrogatoires.

Les défendeurs croient pouvoir citer comme favorable, au moins à la position du défendeur Allard, une autorité très-sévère et d'un grand poids sur la matière qui nous occupe.

Bédarride,—Vol. I, Nos. 231, 643 ;

Vol. II, Nos, 1432, 1438.

Le demandeur n'a pas prouvé que sa créance fut antérieure à celle du défendeur Allard. Au contraire, Allard prouve que sa créance existait depuis plusieurs années, et elle doit être présumée plus ancienne que celle du demandeur.

Puis le demandeur n'a pas prouvé que le défendeur Lortie fût, à l'époque de la vente, ou avant, un homme engagé dans le commerce. Il reconnaît qu'il est boulanger, mais comme il le dit dans sa lettre, attachée à la commission rogatoire, il n'a que sa journée et celle de son fils pour vivre, c'est-à-dire son salaire de

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Lortie et al. chaque jour. Ce n'est pas ici un boulanger qui tient boutique, et le demandeur n'a pas prouvé que sa créance soit pour des effets vendus au défendeur pour l'alimentation de son commerce. C'est un boulanger qui travaille à la journée ; c'est un journalier. Le produit de la vente de son petit mobilier en est une preuve.

Partant le précédent cité plus bas s'applique au cas actuel.

L. C. jurist, vol. 11, page 300. *McConnell v. Dixon*.

F. X. Drouin, pour le demandeur. Il faut d'abord se rendre compte des principes qui régissent l'action Paulienne.

1° L'acte attaqué, pour être annulé, doit causer du préjudice à celui qui l'attaque.

2° Cet acte doit être accompagné de fraude de la part du débiteur ; fraude qui est toujours présumée, si le débiteur est insolvable lors de la passation de cet acte, ou si cet acte a pour effet immédiat de le rendre insolvable.

Chardon, vol. 2, page 370, No. 205. Bédarride, Dol et fraude, vol. 4, page 41, No. 438.

3° Si l'acte est onéreux, il faut complicité de l'acquéreur ; complicité que notre loi (art. 1035) présume du fait de la connaissance par l'acquéreur de l'insolvabilité du débiteur.

Quant aux deux premières conditions, nul doute qu'elles ne reçoivent leur application en cette cause ; il suffit pour s'en convaincre, de se reporter aux aveux contenus en la déposition d'Allard, en lès réponses aux questions annexées à la commission rogatoire, et aux lettres jointes à cette dernière.

Quand à la dernière, il ne peut y avoir de doute : parce qu'à travers une foule de dénégations, auxquelles d'ailleurs on doit s'attendre quand on examine les défendeurs dans de semblables causes, les faits suivants ressortent clairement de la preuve, et leur aveu a d'autant plus de valeur que les défendeurs sont habiles et intelligents, savoir : que Allard est depuis quatorze ans le gendre de Lortie—que Lortie lui doit depuis longtemps—que Allard a demandé paiement à Lortie—que Lortie lui a dit que s'il voulait être payé, il lui fallait acheter sa maison—que Allard ne connaissait pas cette maison et l'a achetée sans la voir,

que Allard avoue avoir fait une bonne affaire, et se promet de faire du profit—que Lortie a toujours été depuis la vente, en possession de la maison et ne paie aucun loyer—que cette vente a été faite à la hâte—que Allard savait que Lortie devait depuis longtemps à Clarke—qu'il savait aussi que Clarke réclamait paiement puisque plusieurs fois il avait été prié par Lortie et son épouse de demander à Clarke de leur accorder du délai, et qu'il avait effectivement demandé ce délai—que ce délai est demandé dans des termes qui font aisément présumer que l'on craignait une poursuite—qu'enfin Allard connaissait parfaitement les affaires de son beau-père Lortie ;

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Parce que tous ces faits constituent des présomptions concordantes et conclusives de la connaissance par Allard de l'insolvabilité de Lortie ;

Parce que ces présomptions, quoique présomptions simples, n'ayant pas été détruites par les défendeurs, sont suffisantes pour prouver la connivence et la complicité d'Allard ;

Parce que c'est surtout dans l'action Paulienne que le demandeur a droit au bénéfice de l'application de l'article 1242 de notre code.

Larombière, vol. 1, art. 1167, page 749, No. 41.

Demolombe, contrats, vol. 2, page 202, No. 203.

Aubry & Rau, Vol. 4, page 137.

Dalloz, Rep., vol. 33, page 233, No. 980.

Journal du Palais, 1829, 17 août, cour de cass. Bélin et ses créanciers.

Toullier, vol. 3, 2ème partie, page 229, No. 355.

Bédarride, du dol et de la fraude, vol. 4, page 49, Nos. 1446, 1447, 1450, 1451.

Chardon, du dol et de la fraude, vol. 2, page 370, No. 203, *in fine*, page 478, Nos. 278 et 279.

Constatons maintenant que les défendeurs n'ont pas plaidé séparément ; qu'Allard n'a pas établi qu'il lui était dû par Lortie,

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Lortie et al. ni qu'il a réellement payé la balance du prix de vente ; que tel paiement n'a pas été fait en présence du notaire instrumentant— que Lortie est resté après la vente et est encore en possession de l'immeuble—et nous arrivons à la conclusion qu'Allard n'est qu'un *prête-nom* ; que l'acte de vente du 25 avril 1876 n'est pas seulement frauduleux, mais est aussi entaché de simulation, ou que cet acte sous la forme de vente est une donation.

JUGEMENT.

Considering that the deed of sale of the 26th April, 1876, passed before Hamel, notary, was executed by the defendant Lortie in favor of his son in-law ; that it was in effect a sale of the whole property of the said Lortie, that the said Lortie, after the passing of the said deed remained in possession, of the property sold, without paying or giving or having agreed to pay or give any rent or other valuable consideration ; that the said Lortie was at the time indebted to the plaintiff, and was insolvent ;

And considering that it results from the above mentioned facts, from the proof adduced by the plaintiff, and from the absence of proof on behalf of the defendants, that the defendant Allard was aware of the insolvency of the said Lortie, and that the said deed was fraudulent, collusive and simulated and is injurious to the plaintiff ;

Doth adjudge and declare the deed of sale of the 26th April, 1876, passed before Hamel, notary, fraudulent, collusive and simulated, and consequently null and void as against the plaintiff, and that the said Pierre Allard could not and did not obtain by virtue thereof or of registration thereof, any right of property in the immoveable thereby sold, as against the said plaintiff, the whole with costs.

Jugement confirmé.

M. Chouinard, pour les Défendeurs.

F. X. Drouin, pour le Demandeur.

COUR SUPÉRIEURE, KAMOURASKA.

MARS 1878.

Coram McCORD, J.

LORTIE v. DIONNE *et al.*

DONATION—FRAUDE.

JUGE :—Qu'un acte de donation entre proches parents, passé au moment où le donateur vient d'être assigné pour dette, en l'absence de preuve de bonne foi, est prononcé frauduleux.

Action pour annuler un acte de donation.

JUGEMENT :

Considérant que l'acte de donation dont on demande la nullité a été passé lorsque la donatrice et son mari venaient d'être poursuivis par le demandeur dans une action pour dette au montant de \$82.67, laquelle action ils n'ont pas contestée, bien que la donatrice eut été assignée personnellement.

Considérant que le dit acte est de fait une donation *omnium bonorum* faite entre proches parents, et dans le cas d'une mère à son fils.

Considérant qu'il résulte de ces circonstances une présomption de fraude qui n'est pas détruite par le fait que la donation est faite à certaines charges minimales, et à la charge par le donataire d'entretenir sa mère, charge qui pouvait lui incomber de droit sans cela.

Considérant que les défendeurs n'ont pas fait de preuve suffisante pour établir que la dite donation était faite de bonne foi et non pas en fraude de créancier.

Déclare le dit acte du 8 décembre 1875 nul, et de nul effet, et les parties demanderesse et défenderesse relativement comme telles, remises dans le même état qu'elles l'auraient été sans la passation du dit acte.

CIRCUIT COURT, 1878.
CIRCUIT COURT, QUEBEC.

NOVEMBER 1878.

No. 4273.

Coram CARON, J.

NEILAN v. DEMERS.

Held:—That in the Circuit Court, non appealable, where the action has been returned in vacation, the notice of inscription for proof and hearing on the merits must be given three days at least beforehand, even where such notice is given during term.

Délibéré discharged.

Vide articles 1099, 1078 C. C. P.

COURT OF REVIEW, QUEBEC.

NOVEMBER, 1878.

Coram MEREDITH, C. J. STUART, J. CARON, J.

ARMITAGE *et vir*, v. EVANS.

Held:—That a proprietor of an undivided share of real estate may, if his right be denied by his co-proprietors, bring an action *en revendication* to establish his right by a judgment, and secure payment of his share of the revenue; but a judgment cannot be rendered in such case so as to cause the defendant to be dispossessed of any part of the common property.

MEREDITH, C. J.

This is a petitory action respecting a *lot of land* upon which there are valuable buildings.

The female plaintiff claimed an undivided one sixth part of the property, and by the judgment under review she is declared proprietor of an undivided one eighth part of it.

The defendant in his factum admits " que la filiation établie dans la cause démontre qu'elle (la demanderesse) est héritière pour un huitième dans la succession de son aïeul."

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But the defendant contends, at the same time, " que la présente action est mal fondée à sa face, et qu'on ne peut pas réclamer une partie indivise et indéterminée d'un immeuble."

The defendant admits that there is one judgment against his contentions, namely *Cannon v. Oneil*, 1 L. C. R., p. 160, in which it was held :

" That the heir may proceed by means of the petitory action for the recovery of immoveables appertaining to the estates of his father and mother, even though such immoveables should be in the possession of a third party claiming an undivided portion of the same, à titre de douaire, and that it is not necessary, in such case, that the heir should proceed by the *action en partage, communi dividendo*."

The defendant maintains that *Cannon v. Oneil*, is an isolated case, and in support of his own contention refers to *McAdam v. Kingsbury*, (1) September, 1857, (DAY, SMITH and MONDELET, J J.), in which Mr. Justice DAY observed :

" The defendant had established a title to seven undivided twentieths of the farm, for the recovery of which the present action is brought ; and the action must therefore be dismissed. It has been repeatedly held by this Court, that the remedy for a proprietor *par indivis*, who desires to obtain possession of his property from a co-proprietor, is by an action *en partage*, and not by a petitory action. (2)

I have also a newspaper report of the case of *Benson v. Lillie*, (Sup. Court Montreal, 29th February, 1872), in these words : " a widow brings a petitory action to recover one half of a property, acquired during the community of property with her husband. There has been no partition and that should precede the present action."

(1) 1st L. C. Jurist, p. 287.

(2) Judgment to same effect by same Court. *Lalonde v. Lalonde*, 5. L. C., R. p. 97 also *Giroux v.*—Nov. 1859.

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In a more recent case, *Morin v. Schüller*, Sup. Court, Montreal, 3rd November, 1874, one of the *considérants* of the judgment is in the following words :

“ That even supposing the plaintiff had, under the will of the said Joseph Morin the elder, a title to one undivided half of the property in question, the present action in manner and form as the same has been brought by the plaintiffs cannot in law be maintained against a co-proprietor, *par indivis*, which by the pleadings of record the defendant is admitted to be, doth dismiss the said action with costs.”

The last mentioned judgment was confirmed, but, as the judgment of the Court of Appeals expressly declares, not for the reasons given in the judgment of the Superior Court.

The defendant has also referred to the judgment of the Court of Appeals in *Gauthier v. Glodu*, (7 L. C. J. 99), as deciding : “ Qu’un propriétaire d’un immeuble indivis ne peut pas porter l’action pétitoire contre son co-propriétaire.”

Such is certainly the heading of the report ; and it is in accordance with the observations of at least one of the Judges, but upon referring to the judgment itself (reported at page 101), it will be found to turn upon a wholly different ground.

Having now adverted to all the reported decisions on this subject, within my knowledge, I shall proceed to the consideration of the facts of the case, which I must say, seem to me to indicate clearly the remedy to which the plaintiff is entitled.

As already mentioned, the plaintiff is the owner of an undivided $\frac{1}{4}$ th of the real estate in question, and the defendant who has been in possession of the whole of it, up to the time of the institution of this action, denied the right of the plaintiff to any part of it. The defendant now however admits that the female plaintiff is the representative of her grandfather for $\frac{1}{4}$ th part of her succession, and that the lot of land in question formed part of that succession ; but the defendant argues, as was argued in *McAdam v. Kingsbury*, “ that the rights of the parties being undivided, the defendant has a property in every atom of the farm,” and therefore cannot be ejected from any part of it.

That argument is I think sufficient to show that no judgment ought to be rendered, under which the defendant could be forcibly deprived of the possession of any part of the property in dispute, but speaking with much deference, and as I ought to do, considering the judgments to which I have adverted, it does not seem to me to follow that the action ought to be dismissed, as the defendant contends, and as was done in *McAdam v. Kingsbury* and other Montreal cases.

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The right of the plaintiff having been denied, she had, it seems to me, an interest in bringing, and was justified in bringing, an action to cause that right to be legally established; which might be a matter of great importance to her, either with reference to a sale or otherwise. Moreover, as long as the property remained undivided, the plaintiff had a right as far as possible, to enjoy her $\frac{1}{4}$ th of it, in the same way that the defendant enjoyed his $\frac{1}{4}$ ths, and more particularly to enjoy her $\frac{1}{4}$ th of the revenue.

In answer to the contention of the defendant, that the plaintiff ought to have recourse to an action *en partage*, the plaintiff may say, that under existing circumstances, it is not for the interest of any of the parties, that the property be brought to sale, or it may be, that the plaintiff would not have the means of bidding for it, in the event of its being brought to sale.

In a word, the plaintiff has two rights, the one to bring the property to a partition, the other to enjoy her share of it, until it be divided; and to say that she has no remedy except an action *en partage*, would be in effect, to say that she has no means of enforcing her second right just mentioned.

Bearing in mind then, what are the acknowledged rights of the plaintiff, and that she should have a remedy co-extensive with her right, it seems to me that her action ought not to be dismissed, as the defendant contends, and on the contrary, that the judgment should maintain her action and acknowledge and establish her right to an undivided eighth of the property, and of the revenue of it, without however, even impliedly, ordering the defendant to be ejected from any part of the property in dispute.

This view, which is concurred in by the other members of the

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Court, is in accordance with a judgment of the Court of Review for this district, (not reported) which had escaped my attention until very lately. That judgment was rendered on the 5th October, 1875, in *Ouellet v. Leduc*, by Mr. Justice STUART, Mr. Justice TASCHEREAU and myself.

The action was a petitory action, for the recovery of an undivided share of certain real estate. The Court below not only maintained the action, but ordered the plaintiff to be put in possession of his undivided share. The judgment of the Court of Review is in effect as follows :

“ Considérant que *pour le moment*, le demandeur n'avait pas
“ le droit d'obtenir cette partie de ses conclusions par laquelle il
“ demande à être mis en possession de la dite partie du dit im-
“ meuble *par mains de justice*, infirme le *dit jugement*, et cette Cour
“ rendant le jugement que la dite Cour aurait dû rendre, déclare
“ que le dit Paschal Ouellet est propriétaire d'un quatrième
“ indivis de la terre suivante, etc., etc.

“ Et la Cour ordonne que sous quinze jours de la significa-
“ tion du présent jugement, le dit défendeur sera tenu de délais-
“ ser et délivrer au dit demandeur la possession et jouissance du
“ quatrième indivis de la susdite terre, ou circuit de terre, et du
“ quatrième indivis des bâtisses tel que susdit.

“ Et la Cour condamne en outre le dit défendeur à payer au
“ demandeur, la somme de cinquante piastres, courant comme
“ représentant la valeur des fruits et revenus perçus par le
“ dit défendeur pour le quatrième indivis des fruits et revenus
“ de la dite terre, la Cour *réservant au demandeur tel recours et action*
“ *en partage que de droit.*”

The foregoing judgment which seems to me to give the plaintiffs a remedy, exactly co-extensive with their rights, admits the principle contended for, and I think properly contended for, by the defendant in *McAdam v. Kingsbury*; and at the same time is not open to the objection, that by saying the owner of an undivided share of property shall have no other remedy, than an action *en partage*, he is deprived of any protection for his undivided rights, and is compelled to proceed to a partition, whether it be for his interest or not.

As shewing that the action *en partage* is not the only remedy allowed by law, to the owner of an undivided share of real estate, I may refer to the following passage in Guyot's Repertoire, vol. 15, p. 619.

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"On peut aussi intenter l'action en revendication, quoique on ne soit propriétaire de la chose que pour partie, et même qu'elle ne puisse se diviser qu'intellectuellement, et non réellement. Eorum quoque quæ sine interitu dividi non possunt, partem petere posse constat. L. 85, par. 3. D. de-rei vindic."

The same authority will be found in Merlins Ed. of the Repertoire, vol. 29, p. 411, Revendication, S. 1, No. 111.

Such being our views, the judgment under review, will be confirmed, in so far as it establishes the right of property of the plaintiff.

As to the value of the defendant's improvements, we cannot say we agree in the opinion expressed by the learned judge in the Court below. On the contrary, we think the value of the improvements to which the defendant is entitled, greatly exceeds any claim the plaintiffs may have on account of any rents, issues and profits received by the defendant. Our views as to this part of the case, will be found explained in the formal judgment.

Judgment confirmed establishing plaintiffs' right of property; but the evidence being insufficient to show to what extent defendant's claim for improvements exceeded his liability for profits received by him, and he not having prayed to be continued in possession of plaintiffs' share until payment of his improvements thereon, his recourse for such improvements reserved to him, and plaintiffs' recourse for the said profits and for a *partage* also reserved. Costs in the Court below against defendant, and in Review against plaintiffs.

Ives & Brown, for Plaintiff.

Laurier & Lavergne, for Defendant.

VICE ADMIRALTY COURT, QUEBEC.

FRIDAY, 29th NOVEMBER, 1878.

THE WILLIAM, SAMSON.

1. If a tug, for a stipulated price promises to tow a vessel from one place to another, her engagement is, that she will employ competent skill, with a crew and equipment reasonably adequate to the object, without a warranty of success under every difficulty.

2. Where a tug deviated from an order of her tow and was afterwards so deficient in skill as to allow the tow to collide with another vessel :—*Held*, that the tug was liable for the consequence of the collision.

JUDGMENT.

HON. G. OKILL STUART.

This suit has been brought by the owners of the barque *Commodore* against the tug steamer *William*, to be indemnified for damage said to have been caused by her negligence, while towing the *Commodore*, on the afternoon of the 25th of May last, near *Indian Cove*, on the south shore of the St. Lawrence, about four miles below the city of Quebec. The owner of the *William* had, for a stipulated price, agreed with the master of the *Commodore* to tow her down the St. Lawrence, from her anchorage opposite *Indian Cove*, and went alongside of her for that purpose. The *William* is a powerful tug of 85 tons and 75 horse-power. The *Commodore* is a barque of 562 tons and was laden ready for sea. At the time the tug went alongside the *Commodore*, there were two vessels outside of her to the north ; one was the *Dunrobin Castle* on her starboard bow, and the other the *Schelde*, a Norwegian barque on her starboard quarter, both at anchor. These three vessels being thus situated, the tug steamed ahead of the *Commodore* with a towing hawser attached, and by advancing or stopping, relieved her men in weighing her anchor. After it was tripped, off the ground, the pilot of the *Commodore* hailed the tug to go ahead ; this was an order, and so understood by the master of the tug, to go straight ahead, which would have taken the *Commodore* to the south of the *Dunrobin Castle*, somewhat more than a cable's length from her, and thus she would have passed round the bow of that vessel, and to the starboard of the *Schelde*, lying nearly three cables' length below the *Dunrobin Castle*, and almost

in a line with her. Instead of complying with this order, the master of the tug directed her helm to be ported, and that she should go ahead "full speed"; she accordingly did so, and the *Commodore* followed in tow also on her port helm, which brought the tug very speedily under the stern of the *Dunrobin Castle*. The tug continued on her port helm, until beyond the *Dunrobin Castle* where her tow rope became so slack, that she but made progress and no more. The *Commodore* canted and drifted with the ebb, broadside upon the *Schelde*, her main rigging came into contact with the jib boom of the *Schelde*, and the damage was done, for which reparation is demanded.

The *William*,
Simsen.

The owner of the tug has pleaded, that the pilot of the *Commodore* ordered her to go ahead, to pass between the *Dunrobin Castle* and the *Schelde*, that with full power she proceeded to pass astern of the *Dunrobin Castle*, that she was impeded at first by the anchor of the *Commodore* not being fairly off the ground, and the ebb catching the *Commodore*, she was thereby driven towards the *Schelde*, and came into collision, which might have been avoided, had the *Schelde* starboarded her helm which she was hailed from the tug to do, or had the *Commodore* cast off the hawser.

This defence, it may be observed at once, has failed on several and the most material points. It is established that the anchor of the *Commodore* was well up from the ground, when the order for her to go ahead was given, that the pilot of the *Commodore* who gave this order, intended that it was to go ahead south of the *Dunrobin Castle*, that it was so interpreted at the moment it was given by the master of the tug, and that with ordinary care the passage between the two vessels could have been safely accomplished.

The circumstances attending this collision were but partially disclosed in the case of the *Schelde* against the *Commodore*, in which that vessel was charged with fault, and as the cause of it. That case was dismissed, because the tug *William* had allowed the *Commodore* to drift upon the *Schelde*, and because the *Commodore* was not to blame. In this case however, the difficulty as to why the tug allowed the *Commodore* to drift upon the *Schelde*, has been removed, and the cause of it is to be found in testimony adduced for the tug. Three persons, who were on her deck, have been examined for the respondent; her master,

The William Samson. secondly, a person acting under his orders who has been a pilot, but has lost his branch for misconduct, and the third a seaman named *Garneau*, who were all in the round-house before the collision. The two first do not disclose the cause of the accident, but the third, perhaps unconsciously does. He has said that he heard the master of the tug give the order *Full speed ahead* at the time she started with the *Commodore* in tow, and that she then went at that rate for about five minutes, that about three or four minutes after this order was given, he heard the master of the tug say to the person acting under him in the round house to put his wheel to go to the north, so as to pass the stern of the *Dunrobin Castle*, and that he would rather go astern of this ship than in front of her; he did not say why. *Garneau* has also said that about four minutes elapsed from the time the tug passed the *Dunrobin Castle*, until the collision. These computations of time seem to be accurate and accord with other testimony. And now I come to an important fact stated by this witness, which shews why it was that the speed of the tug became so very much reduced, after she passed the *Dunrobin Castle*, —it was to change the tow line from starboard to the port side of the tug. His testimony is in these terms: *nous avons passé de derrière du Dunrobin Castle un petit peu quand nous avons changé le grelin, c'est-à-dire nous l'avons accroché au poteau à gauche, et cela pour donner une chance à notre steamboat de virer en haut et par là donner plus de chance au bâtiment que nous remorquions de clairer le Schelde. Nous avons slacké notre vitesse une seconde pour faire cet accrochement de notre grelin.* The tug, according to this witness, appears to have been repeatedly called to from the *Commodore* to keep her head up the river, which I take it is signified by the term *virer en haut*, in other words to starboard her helm. This was followed by forcible language from the mate of the *Commodore* to go ahead. Then there is this significant fact stated by the same witness. It was at the very moment of collision the tug straightened up her course and went ahead. The cause of the collision is thus explained. At the critical moment for a successful accomplishment of the manœuvre, which the evidence shows was quite feasible, it was discovered that the tow line had been thrown over the wrong post, and while it was being shifted to the right one, the *Commodore* was allowed to drift down upon the *Schelde*. No doubt, it may have taken but a second to remove the tow line from one post to the other, but before that, there was to be removed the strain and pressure of a 562-

ton ship, bearing upon the tow post, and until then, no number of men could change the tow line from one post to the other, which was ultimately effected only by the speed of the tug being reduced to nearly "dead slow." The conclusion is that the tug was not in proper trim, when she attempted to pass between the vessels.

The William,
Falmouth.

The skilful aid which I have had from the nautical assessors, will appear from the following answers to questions submitted by me to them.

1st. *Question*.—Was the anchor of the *Commodore* tripped, that is clear of the ground, before the tug *William*, commenced towing her? *Answer*.—It was.

2nd. *Question*.—Did it continue so from that time until the moment of the collision? *Answer*.—It did.

3rd. *Question*.—If the tug had gone ahead as directed by the pilot of the *Commodore*, would there have been any collision? *Answer*.—There would not, as the tug and tow would have gone safely to the south of the *Dunrobin Castle*.

4th. *Question*.—With the length of the anchor chain out, when the *William* started and was crossing and had crossed the stern of the *Dunrobin Castle*, could she have taken the *Commodore* in safety between the *Dunrobin Castle*, and the *Schelde*, and in what way? *Answer*.—She could by the tug putting her helm a starboard the moment she was clear of the *Dunrobin Castle*.

5th. *Question*.—It being in evidence that after the tug had passed under the stern of the *Dunrobin Castle*, the tow line from where it was attached to the tug was shifted, that is, from the starboard to the port post, would the doing of this have had the effect of retarding the progress of the tug with her tow after she had passed the stern of the *Dunrobin Castle* so as to allow her to drift upon the *Schelde*? *Answer*. When the tug had passed the *Dunrobin Castle* she continued with her helm a port, instead of starboarding immediately. It appears that upon an order to starboard the helm of the tug being given, an attempt was made to shift the tow line from the starboard to the port post, which occasioned delay, and we can, in no other way, account for the tug not going ahead as directed from the *Commodore*, than by the

The William,
Samson. delay occasioned in the shifting of the tow line, to do which it was necessary to slacken the tow rope. This delay occasioned the *Commodore* to drift on the *Schelde*.

6th. *Question.* Could any precaution have been taken on board of the tug before she began to tow the *Commodore* so as to prevent or avoid the delay referred to in the last question? *Answer.* The tow line should have been shifted before the tug started to tow the *Commodore*, and could have been foreseen as likely to be necessary. This was rendered necessary by the tug neglecting to keep her head up, by starboarding her helm, so as to allow room for the *Commodore* to pass clear of the *Schelde*. If either of these precautions had been taken there would have been no accident. And we attribute the collision in question to these omissions alone.

E. D. ASHE,
Commander, R. N.,
F. GOURDEAU,
Harbour Master.

It was argued for the defence, that although the order for the tug to take the south side of the *Dunrobin Castle*, was not obeyed, the pilot of the *Commodore* agreed to the change, because he did not again give his order to go to the south or a counter order. The master of the tug, without any notice to the *Commodore*, with a full pressure of steam on, had evidently determined not to obey it, and his precipitation in the carrying out his determination may probably have led to the collision. The tug went across and under the stern of the *Dunrobin Castle*, very rapidly, and a divided command then might have been attended with serious consequences. The master of the tug had previously disobeyed some orders of the pilot, and it seems to me certain, that he had made up his mind to disobey this one, and what makes the matter worse, he has attempted to justify his conduct by stating that there were vessels above so near as to prevent his going ahead of the *Dunrobin Castle*, which was not the case.

But if the pilot did approve of the change this does not mend the matter for the tug, because the passage between the two vessels, it is admitted, could have been accomplished with proper precaution. Again it has been said that the *Commodore*

the tug ; this is very questionable and would ^{The William, Bameon.}
ous experiment, much more so than waiting
ufficiently ahead, to enable the *Commodore* to
out a few moments more would have sufficed
ould have done so, were it not that the *Schelde*
espondent's plea, neglected to starboard her
ound of defence is this neglect of the *Schelde*;
romoter has nothing to do. If she were guilty
this particular it would afford no justification
the tug, nor would it relieve her from liability.
le to be applied is, when a steamboat engages
for a certain remuneration from one point to ano-
not warrant that she will be able to do so and will
circumstances and at all hazards, but she does
will use her best endeavors for that purpose, and
the task competent skill and such a crew, tackle
t, as are reasonably to be expected in a vessel of
). The *William* is a powerful tug. She had on a full
ain and was quite equal to do the work which her
ertook to do, but, unfortunately, competent skill for the
wanting, and she must be made liable for the absence

judgment maintains the claim, to be settled upon the
ference, with costs.

r the *Commodore*, Ross, Stuart & Stuart; for the *William*,

COUR SUPÉRIEURE, QUÉBEC.

SEPTEMBRE, 1878.

No. 2073.

Coram CASAULT, J.THOMPSON *et al.*, v. LACROIX *et al.*

CAUTIONNEMENT JUDICIAIRE—CAPIAS.

Jugé :—Que le débiteur qui a donné caution qu'il ne laisserait pas les limites de la Province, ne cesse pas d'être sous détention ; il n'a qu'élargi les limites du lieu où il est détenu, et changé de gardien en substituant les cautions au shérif.

2. Que l'absence, même temporaire, du débiteur, des limites de la Province, constitue une contravention à l'obligation, et donne au créancier son recours contre les cautions.

Per curiam.—Le 16 août 1876, Joseph O. Lacroix a été arrêté en vertu d'un bref de *capias ad respondendum* émané à la poursuite des demandeurs. Le 4 septembre suivant, les deux défendeurs se sont portés cautions spéciales que le dit Joseph O. Lacroix ne laisserait pas la Province du Canada, c'est-à-dire la partie de la Puissance formant ci-devant cette province, et que, ce cas échéant, ils paieraient le montant du jugement à intervenir en capital, intérêts et frais, le tout conformément à l'article 824, C. P.

Les demandeurs ont obtenu jugement contre le dit Joseph O. Lacroix, le 19 octobre 1876 pour \$300.00 avec intérêt du 16 août 1876, et les dépens taxés à \$109.57 ; et le dit Joseph O. Lacroix ayant depuis laissé les limites de la dite ci-devant province, les demandeurs ont poursuivi les deux défendeurs sur leur cautionnement, pour recouvrer d'eux le montant du dit jugement en capital, intérêts et frais, moins \$44.66 par eux reçus sur une exécution. Les défendeurs ont opposé à cette demande une dénégation générale, et pour exception : que le dit Joseph O. Lacroix avait laissé, à la suggestion des demandeurs, pour leur donner un recours contre les défendeurs, que le dit Joseph O. Lacroix ne s'était absenté que temporairement, que les demandeurs savaient qu'il devait partir, et qu'ils auraient pu l'arrêter avant son départ s'ils l'eussent voulu, et qu'aussitôt que les défendeurs eurent appris par leur assignation en cette cause, le départ du

dit Joseph O. Lacroix, ils l'avaient fait arrêter et l'avaient, le 9 ^{Thompson} mai 1878, veille du rapport, remis entre les mains du shérif,—ce ^{et al.,} dont ils auraient donné avis aux Demandeurs en leur offrant les ^{v.} frais de la présente action avant l'entrée, offre qu'ils ont réitérée ^{Lacroix et al} et déposée.

La preuve constate que le dit Joseph O. Lacroix est allé aux Etats-Unis, sans aucune connivence avec les demandeurs, mais au contraire, si on le croit lui-même, à l'instigation des défenseurs, et ce pour se soustraire à l'emprisonnement auquel il avait été condamné pour n'avoir pas produit son bilan dans le temps voulu par la loi. Sa déposition et sa correspondance avec sa femme pendant son absence constatent aussi, si cette circonstance pouvait avoir une importance que je ne lui reconnais pas, qu'il avait l'intention de s'y fixer permanently et de ne pas revenir au Canada. La remise du défendeur, la veille du rapport de l'action, et l'offre de frais jusqu'alors est aussi constatée.

Cette cause ne me paraît pas présenter de difficultés, et n'eussent été les hésitations de l'avocat de l'une des parties et les doutes de ceux de l'autre à l'audition de la cause, et leur admission qu'ils n'avaient pas pu trouver de décisions judiciaires applicables, je ne me serais pas donné la peine d'en chercher. En effet, voici des cautions judiciaires qui obtiennent la mise en liberté d'un débiteur arrêté en vertu d'un *capias*, en garantissant, aux termes mêmes de la loi, qu'il ne laissera pas les limites de la ci-devant province du Canada, et que s'il les passe, ils paieront au créancier qui l'a fait arrêter, sa dette en capital intérêts et frais. C'est le cautionnement judiciaire d'une obligation de ne pas faire, avec clause pénale; du moment où le débiteur a contrevenu à l'obligation, la peine est due, et elle doit être payée par les cautions qui ont souscrit l'obligation et qui n'ont pas pu empêcher la contravention. La preuve, comme je l'ai déjà dit, établit chez le débiteur l'intention de ne point revenir; mais cette circonstance n'ajoute point à la responsabilité des cautions. Ce qu'ils ont garanti, c'est qu'il ne dépasserait pas certaines limites que la loi et leurs obligations mentionnent: du moment où il les a dépassées, la peine est encourue et elle peut être exigée. On conçoit la position difficile, pour ne pas dire impossible, que ferait au créancier l'obligation de prouver l'intention de son débiteur en laissant, les fraudes auxquelles elle l'exposerait, et la prise qu'elle donnerait à la mauvaise foi. La loi n'a pas voulu

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faire dépendre son recours de circonstances qui l'eussent rendu incertain et douteux, voire même dangereux, en l'exposant à des frais considérables.

Le débiteur qui a donné caution qu'il ne laisserait pas les limites de la province ne cesse pas d'être sous détention, il n'a qu'élargi les limites du lieu où il est détenu, et changé de gardien en substituant au shérif les cautions. On n'a jamais douté que le shérif ne fût responsable de la dette du débiteur qui s'était sous-trait temporairement à sa garde. La responsabilité des cautions sous ce rapport est la même.

Il m'a été impossible, je l'avoue, de trouver dans nos rapports de causes aucune décision sur ce point, si ce n'est le langage employé par feu le juge GALE, exprimant l'opinion de la Cour d'Appel, dans la cause de *Stewart v. Hamel et Dubord*. (1 Rév. de législation, 212,) qui me paraît suffisamment clair, dans ce sens. Le jugement renvoyant l'action contre les cautions a été confirmé en appel, mais pour deux raisons, la 1ère, parce que le cautionnement ne contenait pas la condition que faisait la loi, et la 2ème, parce que le lieu où était allé Mackenzie, le débiteur cautionné, n'était pas prouvé être hors de la province.

Les rapports des cours d'Ontario en contiennent plusieurs sous des statuts permettant des cautionnements analogues, qui donnent aux débiteurs emprisonnés sur *capias* leur liberté dans des limites connues sous la dénomination de "*gaol limits*," qui sont généralement celles du comté

Lewis v. Grant, (1 Queen's Bench R. 290, 1845). L'action contre la caution était fondée sur ce que le débiteur étant allé au bureau de poste de Sandwich, qui, quoique touchant une rue dans cette ville, n'était pas dans les limites de la ville. Elle a été renvoyée parce qu'il n'était pas établi que le débiteur fut entré dans le bureau de poste et qu'il ne paraissait pas par là même avoir laissé les limites de la ville de Sandwich que lui assignait le cautionnement.

Hedden v. Gregory et al., (10 Q. B. R., 1853.) Dans cette cause, le cautionnement donnait à la liberté du débiteur la limite des comtés unis de Lincoln & Welland. Il était allé et avait passé la nuit chez son beau-frère dans un township qui touchait au comté de Welland, mais était dans celui d'Haldimand : la défense des

cautions était que le débiteur avait été informé et croyait que la résidence de son beau-frère était dans Welland. Cette excuse a été jugée n'en être pas une. Thompeon
et al.,
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Lacroix.

Brown et al. v. Paxton et al., (19 Q. B., 238, 1860). Le débiteur Salmoni avait donné caution qu'il ne laisserait pas le comté d'Essex, et s'était rendu à Toronto en obéissance à un mandat de l'Orateur de l'Assemblée Législative lui ordonnant de comparaître comme témoin. Jugé que l'excuse n'était pas valable. Le juge-en-chef ROBINSON exprima comme l'opinion de la cour que si le mandat en eût été un le mettant sous la garde d'un officier de la Chambre, l'absence n'eût pas alors été considérée comme volontaire, mais forcée, et n'eût pu être invoquée contre les cautions.

Les défendeurs sont solidairement condamnés à payer \$395.66 avec intérêts du 29 avril dernier, et les dépens.

JUGEMENT.

Considérant que les conditions du cautionnement judiciaire souscrit par les défendeurs étaient que Joseph O. Lacroix ne laisserait pas les limites de la ci-devant province du Canada, et que ce cas échéant, ils paieraient aux demandeurs leur dette avec intérêts et frais; que le dit Joseph O. Lacroix a, avant l'institution de l'action en cette cause, laissé les dites limites et est allé aux Etats-Unis d'Amérique, et que cette contravention aux conditions du cautionnement a donné aux demandeurs recours pour leur dette, intérêts et frais constatés par le jugement et les mémoires de frais produits en cette cause et dont la balance restant due, à la date de l'action en la présente cause, était de \$395.66 ;

Considérant que les dits défendeurs ne pouvaient pas, à l'époque où ils l'ont fait, se libérer en remettant au shérif la personne du dit Joseph O. Lacroix; les dits défendeurs sont solidairement condamnés à payer aux demandeurs \$395.66 avec intérêts du 29 avril 1878 et dépens.

Andrews, Caron & Andrews, pour les Demandeurs.

Gauthier & Choninard, pour les Défendeurs.

COURT OF REVIEW, QUEBEC.

30TH MARCH, 1878.

Coram MEREDITH, C. J., STUART, J., McCORD, J.

BRUNEAU v. GAGNON & GAGNON, Opposant,

AND

PACAUD, hypothecary creditor.

The Plaintiff having sued out an execution against the Defendant, the latter filed an opposition which was maintained with costs. For these costs certain real estate belonging to Plaintiff was brought to sale. **HELD**: That the opposant could not be collocated for and paid the costs in question by privilege and in preference to the claim of a duly registered hypothecary creditor.

Costs, what are privileged, under C. C. P. art. 606, as amended by 33 V. c. 17, s. 2.

Error noticed in the report of *Garneau v. Fortin*, 2 L. C. R. 115, as to the Judges present.

The Record was brought up from the Superior Court at Arthabaska, for review of a judgment of the 12th October 1877, by the Honorable Mr. Justice PLAMONDON, maintaining the contestation of the Report of Distribution.

MEREDITH, C. J.—The question is, as to whether Gagnon, first defendant, and afterwards an opposant, in this cause, is entitled to a privilege for the costs which he claims.

The facts are as follows.

The plaintiff having sued out an execution against the defendant, the latter filed an opposition, which was maintained with costs.

For those costs, certain real estate, belonging to the plaintiff, and hypothecated in favor of the opposant Pacaud, has been sold, and the judgment under review, refuses to give Gagnon, from the proceeds of the sale, and in preference to Pacaud's duly registered hypothec, the costs to which he, Gagnon, was subjected upon his opposition.

The provisions of law which have been referred to as bear-

ing upon this question are articles 1994, 1995 and 2009 of the Civil Code, and articles 306 and 728 of the code of procedure, as amended by the 33 Vic., c. 17, sec. 2.

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Article 1995 declares that "Law costs and all expenses incurred in the interest of the mass of the creditors," are privileged as regards moveable property.

Article 2009, says, in effect, the same as regards real estate. Article 1995 defines law costs, as all those "incurred for the seizure or sale of the moveables, and of judicial proceedings, for enabling the creditors generally to obtain payment of their claims."

Article 1995 which thus defines law costs, seems to make the seizure of the property the point at which the privilege for costs may commence; certainly that article does not say that the plaintiff's *costs of suit* are privileged.

Article 606 of the code of procedure, does, however, by paragraph 7, declare "the plaintiff is next paid his costs of suit, taxed as in an *uncontested case, not inscribed for proof*," and the words: "taxed as in an *uncontested case not inscribed for proof*," have since been struck out by the 33 Vic., c. 17, sec. 2.

It is upon this article 606, that the opposant rests his case, and, in that respect, I think he is right. Before, however attempting to apply that article in the present case, it may be well to refer to the practice as to this matter before the code.

At Montreal (as I believe) no costs before judgment were allowed, as privileged, upon the proceeds of real estate, to the prejudice of hypothecary creditors.

The practice, at Quebec, adopted during the time of Chief Justice SEWELL, and followed during the time of Sir JAMES STUART, was to allow as privileged, such costs as were necessary for the recovery of a judgment; and this, on the ground that without a judgment there could not be a judicial sale, which was deemed necessary in the interest of all concerned. The costs so allowed as privileged, in the cases in which I was concerned, generally ranged between £4 and £6. The costs of Enquete, and contestation, were not included, as a general rule in the privi-

Bruneau v. Gagnon & Gagnon, and Pacaud. leged costs ; as the plaintiff, in proving and maintaining his own claim, could not be regarded as acting for the general benefit of the creditors.

The Commissioners, in their draft of the code of civil procedure, suggested the following paragraph as settling (they said) a doubtful point, " the prosecuting creditor is next paid his costs of suit to an amount, which the Court or judge deems reasonable, by preference over all creditors, other than a pledged." (1)

This paragraph was remonstrated against, on the ground, that the fact of there being differences of opinion on the subject, was only an additional reason for a positive rule, and also on the ground " that the paragraph suggested would in every case necessitate an order of the Court or Judge, as to the amount of costs, to be deemed privileged, before a judgment of distribution could be prepared, and that this would be attended with costs and delay."

The draft does not appear to have been changed by the commissioners ; but in the resolutions containing the amendments made by the Legislature to the draft submitted by the commissioners, it was ordered as I have reason to believe with the concurrence of the commissioners, (under No. 57), that at the end of article 606, the following paragraph be inserted : " The plaintiff is next paid his costs of suit taxed as in an uncontested case, in which no proof is taken."

I have adverted to these circumstances as showing that the rule thus laid down was adopted by the Legislature after the matter had been fully under their consideration.

It is not the less true that very soon afterwards the words, "*taxed as in an uncontested case, in which no proof is taken,*" were struck out.

The learned counsel for Mr. Pacaud contended that the Legislature must have allowed this change to be made, "*dans un moment de faiblesse,*" and I must say that the change (whatever may have led to it it), and which it is to be recollected is

(1) See Report of Commissioners, p. 127.

directly at variance, with the old practice as well at Quebec as at Montreal, must often cause very serious injustice. For instance, if the owner of real estate worth £100, and, mortgaged for that sum, were sued in an action of damages, in which the plaintiff's costs amounted even to \$200, and that the defendant's property were sold to pay those costs, the hypothecary creditor could hardly hope to receive any thing; and thus the debtor, who had no interest in the property, after he had hypothecated it to its full value, would have disposed of it to the prejudice, and without the consent of the person really interested in it; namely the mortgage creditor.

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Picaud.

The fact of such a result being even *possible* in every case, makes it *impossible in any case* for the holder of property worth \$300, or \$400, to give under art. 606, as modified, perfect security upon it by hypothec, for any sum of money whatever.

These observations are I think sufficient to establish, that art 606 as it now exists, and upon which alone the opposant can rely, is not a provision of law which ought to be extended by judicial interpretation, and I think that unless so extended, it cannot be interpreted as giving the opposant a privilege for the costs which he claims.

The words of the law under which the privilege is claimed (and they are given in brackets as new law), are :

“ The plaintiff is next paid his costs of suit.”

The person claiming costs in the present case is not the plaintiff. He first appeared as defendant, and then as opposant, and the costs claimed are not costs of suit, but costs on the contestation of an opposition, and on an inscription in review, in relation to that opposition.

Moreover there is, I think, a real difference between the costs claimed in this cause; and the costs which it was intended to render privileged by art. 606.

Where one of a number of creditors institutes proceedings for the purpose of bringing the property of their common debtor to sale, the costs, indispensable for that purpose, may reasonably be regarded “ as expenses incurred for the common interest of “ the creditors,” within the meaning of article 2009 of the code.

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v.
Gagnon &
Pacaud.

But when the defendant filed his opposition in this cause, and maintained the contestation, upon which the costs in question accrued, he maintained his own interests only, and not the common interests of the creditors, and therefore I think that the costs in question are not such as the Legislature intended to render privileged. Moreover it is to be recollected that privileges are not to be extended by reasoning from one person to another, or from one case to another.

It was however strenuously contended, that as the hypothecary creditors take advantage of the costs made by the opposant, they ought to pay those costs. It was well answered by Mr. Pacaud, that the action of the hypothecary creditors in this matter, was not voluntary, but forced upon them; that the bringing to sale, by chirographary creditors of real estate, appearing on the register to be mortgaged to its full value, without being advantageous to them, is generally speaking injurious to the hypothecary creditors, by causing the property to be sold for much less than it would bring at private sale, and further by causing a great part of the proceeds to be consumed in costs; that where it is for the interest of the hypothecary creditors to bring the mortgaged property to sale, it is to be presumed they will do so themselves, and that where chirographary creditors bring property to sale, in which they have no interest, and without consulting those who are interested, they ought not to be paid their costs out of a fund really belonging to the latter.

This reasoning would be deserving of our consideration if the granting or refusing of the privilege claimed by the opposant depended upon the reasonableness of his contention. But our guide in this case must be the words of art. 606, as amended, and according to that article, we do not think that Gagnon as opposant, has a privilege for the costs on the contestation of his opposition in preference to the registered hypothec of Mr. Pacaud.

I am aware that in *Denys v. St. Hylaire* I concurred in a judgment in which a defendant was allowed £4.9.0 as privileged costs. But the rule adopted in that case was not open to the objections urged against art. 606 as amended. Moreover that case was decided before the code, and, therefore, when there was

no text of law giving a positive rule as to the privilege in question.

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I take this opportunity of saying as I have had occasion to do before, that the judgment in *Garneau v. Fortin*, (1) referred to by the learned counsel for Gagnon, was rendered by Ch. J. BOWEN and DUVAL, J., and not BOWEN and MEREDITH as reported.

Judgment confirmed.

Felton & Crépeau, for Opposant.

Pacaud & Cannon, for contesting creditor.

COURT OF REVIEW, QUEBEC.

30TH NOVEMBER 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.

CLOUTIER v. LAPIERRE.

The Defendant, domiciled at Montreal, wrote to the Plaintiff, a resident of Arthabaska, requesting him to take charge of his, the Defendant's, lands at the latter place, and promising to indemnify him for his services. HELD, that an action for the value of such services brought in the district of Arthabaska was properly dismissed on Declinatory Exception.

The legal meaning of the words "cause of action," considered, and cases collected.

MEREDITH, C. J.

The defendant resides at Montreal, but has property in the district of Arthabaska, where the plaintiff resides. The defendant hearing that trespasses were being committed on his Arthabaska property, wrote a letter from Montreal requesting plaintiff to take charge of it; and promising to indemnify the plaintiff for his services.

The plaintiff alleges that he complied with the defendant's request, that his services and disbursements were reasonably

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worth \$125, that the defendant has refused to pay him, and hence the present action.

The suit which was brought in the district of Arthabaska, was served upon the defendant at his domicile in the district of Montreal, and was met by a declinatory exception alleging that the cause of action did not arise in the district of Arthabaska where the suit was brought, but in the district of Montreal where the defendant has his domicile. By the judgment under review the declinatory exception was maintained.

The plaintiff relies on 9 L. C. J., p. 234, 14 L. C. J., p. 184, 14 L. C. J., p. 186, as justifying his complaint, but it seems to me that those cases are not in point, and that the judgment complained of is in accordance with the judgment at Quebec in *Rosseau v. Hughes*, 8 L. C. R., p. 187, and the judgment of the Court of Appeals, 6 L. C. J., *Senecal v. Chenevert*.

It is true that the wording of our law on this subject has been somewhat changed by our code of civil procedure, but I have already had occasion in *Wurtele v. Lengham*, (1) to explain my reasons for thinking that the verbal change, to which I have alluded, has not made any material change in our law. (2)

The other members of the court agree in these views; the judgment under review will therefore be confirmed with costs.

Judgment confirmed.

Crépeau, for Plaintiff.

Charette, for Defendant.

(1) 1 Q. L. Rep., p. 63.

(2) See as bearing on this subject, 9 L. C. J., 237, and cases there cited, 21 L. C. J. p. 97 and 114, 14 L. C. Jurs. 184, 186, also a very interesting English case *Cooks v. Gibb*, L. R. Com. pleas, Vol. 8, p. 107, also an interesting article 11th. U. C. Law Journal as to the final agreement arrived at by the English Courts respecting the meaning of "cause of action."

COUR SUPÉRIEURE, QUÉBEC.

9 DÉCEMBRE, 1878.

Coram CASAULT, J.THE CANADA PAPER CO. *et al.*, v. CARY.

BAIL—NANTISSEMENT—TACITE-RECONDUCTION.

Le défendeur vendit aux demandeurs un matériel d'imprimerie, pour bonne et valable considération reçue avant l'acte. Il obtint à la même date un bail du dit matériel pour 18 mois, et consentit une obligation aux demandeurs pour certaines sommes payables par termes. Le même jour, les demandeurs reconnurent dans une contre-lettre notariée que l'acte de vente à eux consentie par le défendeur n'était que pour assurer leur créance, et s'obligèrent de lui remettre les effets vendus, aussitôt qu'il aurait payé sa dette avec intérêts. Saisie-revendication de la part des demandeurs, le défendeur n'ayant pas payé.

JUGÉ :—Que ces actes et cette vente (s'ils ne rendent pas les demandeurs propriétaires du matériel d'imprimerie) constatent du moins une promesse par le défendeur aux demandeurs d'un nantissement qui devait recevoir son exécution par la remise comme gage du dit matériel, à l'expiration du susdit bail, si les dettes que ce nantissement devait garantir n'étaient pas alors payées et acquittées.

2. Le contrat de nantissement peut affecter la forme d'une vente.

3. En fait de louage de meubles il n'y a pas de tacite-reconduction.

Per curiam.—Le 29 septembre 1876, le défendeur vendit aux trois demandeurs, savoir : la société J. & W. Reid, The Canada Paper Co., et The Dominion Type Founding Co., un matériel d'imprimerie pour, est-il dit à l'acte, bonne et valable considération que le vendeur a reçu avant la date de l'acte, et dont il se déclare content et satisfait ; et ces derniers, le même jour, lui en consentirent un bail pour 18 mois à compter du 1er octobre suivant, moyennant un loyer de \$340. Le bail contient la stipulation expresse suivante : "That at the end and expiration of the present lease he shall peaceably and quietly surrender and deliver up the said printing materials and other effects, in as good order and repair as the same is now, reasonable allowance being made for wear and tear." Le défendeur consentit aussi à même date une obligation notariée par laquelle il reconnut devoir et promit payer aux demandeurs en 18 mois, par termes de 9, 12, 15 et 18 mois avec hypothèque spéciale sur un immeuble y décrit, des sommes inégales, savoir : à J. & W. Reid, \$1557.09, au Canada Paper Co., \$830.00, et au Dominion Type Founding Co.,

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\$1407.00, et leur donna ses billets pour chacun des dits termes. Le même jour encore, les demandeurs reconnurent, dans une contre-lettre, aussi notariée, que l'acte de vente que leur avait consenti le défendeur n'était que pour assurer leur créance, et s'obligèrent de lui remettre les effets vendus aussitôt qu'il leur aurait payé leurs dettes avec intérêts.

Le défendeur n'ayant pas payé, et refusant après l'expiration du bail de remettre les effets vendus, les demandeurs saisirent et revendiquèrent le matériel d'imprimerie. Ils n'ont pris leur action que sur le bail, et n'y ont allégué l'acte de vente qu'incidemment, et ils concluent à ce que les effets saisis soient déclarés être leur propriété, la saisie revendication bonne et valable, et le défendeur condamné à leur livrer les dits effets, sinon à leur en payer la valeur (\$2500.)

Le défendeur a répondu à cette action par : 1° une défense en fait, 2° une défense en droit qui a été rejetée, et par laquelle il invoquait l'absence d'intérêt commun chez les demandeurs et la tacite-reconduction, l'action n'ayant été prise qu'un mois après l'expiration du bail, et 3° une exception alléguant de nouveau la tacite-reconduction, et en outre l'obligation, les billets et la contre-lettre, l'absence d'un prix dans l'acte de vente et enfin erreur, le défendeur disant avoir été trompé par les promesses des demandeurs qui s'étaient obligés de lui remettre ses effets, erreur aussi sur la portée de l'acte de vente, concluant à ce que l'acte de vente fut annulé, et l'action des demandeurs renvoyée.

Il n'y a pas de doute qu'entre les parties l'acte de vente et la contre-lettre ne font qu'un seul et même contrat, que, par conséquent, il n'y a pas une vente réelle des effets énumérés à l'acte, et que le contrat résultant des deux actes en est un de nantissement qui, pour être parfait, requerrait la tradition effective des meubles que l'on voulait gager. La jurisprudence et les arrêts reconnaissent que le contrat de nantissement peut affecter la forme d'une vente.

Troplong nantissement No. 39. " Quelquefois le nantissement affecte les formes extérieures d'un contrat de vente. Pour donner plus d'efficacité au nantissement, les parties lui donnent l'apparence d'une vente de la chose. C'est au juge à examiner les faits, et à voir si, sous cette écorce extérieure, ce n'est pas

" une garantie qui est donnée à un créancier, et non une vente
 " qui est passée à un acheteur."

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 et al.,
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Le même jurisconsulte, au No. 204 et 307 de son contrat de nantissement, dit que les tiers ne peuvent pas se plaindre de ce que les parties ont eu recours à une vente, quand il n'y avait effectivement que dation de gage.

2 Pont, petits contrats sur art. 2074, p 586, No. 1090.

7 Boileux sur art. 2075, p. 127, dernier alinéa.

Les arrêts suivants ont aussi décidé que le nantissement n'en est pas moins valable, lorsque le contrat est une vente sous laquelle les parties ont déguisé le contrat véritable qu'elles avaient en vue

Bourges, 14 juin 1844, (S. 44, 2, 633.)

Cassation, 23 juillet 1844, (S. 44, 1. 859.

Rennes, 29 décembre 1849, (S. 51, 2. 155, et surtout les notes de Sirey au bas, et les auteurs qu'il cite.

Cassation, 2 juillet 1856, S. 59, 1. 56.)

Il n'y a pas de doute non plus que les demandeurs n'ont pas eu la possession réelle du gage qui est resté au défendeur en vertu du bail, et qu'ainsi ils ne sont ni propriétaires ni gagistes. Mais il n'est pas moins vrai que, si l'absence d'une appréhension nouvelle a empêché la perfection du nantissement, il n'en reste pas moins obligatoire quant aux parties contractantes comme promesse de nantissement, et que celui qui a promis de donner le gage est obligé de le livrer.

Pothier, nantissement No. 9. " Il est vrai que je puis convenir avec mon créancier que je lui donnerai des gages, et que cette convention est valable et obligatoire par le seul consentement."

Troplong, nantissement No. 28. " Le débiteur qui a promis un gage est tenu de le livrer."

La Cour royale de Bordeaux a jugé le 8 juin 1832, (Sirey, 32 2. 655) " que le défaut de remise au créancier du gage promis

The Canada " par le débiteur ne peut être invoqué par ce dernier, ni par ses
 Paper Co. " héritiers, comme une cause de nullité du gage ou nantissement."
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2 Pont, petits contrats sur art. 2076, p. 615, No. 1122, dit aussi que le créancier non remboursé a incontestablement droit à la chose promise, et que, si elle est chez le débiteur, il peut se la faire livrer.

7 Boileux sur art. 2072, dit même que le créancier peut se faire livrer une autre chose d'égale valeur, si le débiteur ne remplit pas son engagement, et ne peut pas livrer la chose promise.

Le bail consenti par les demandeurs au défendeur n'a pas soustrait ce dernier à l'obligation de livrer le gage ; il n'a fait que mettre un terme, le 1er avril 1878, à l'exécution de cette obligation ; et le défendeur s'y refusant, les demandeurs avaient l'action pour le faire condamner à leur livrer les effets qu'ils lui avaient loués. Comme on le voit, j'envisage le droit du demandeur et l'obligation du défendeur sous leur aspect le plus restreint. Le défendeur qui a pris un bail, qui détient les effets à titre de locataire, peut-il refuser d'exécuter ce contrat et de remettre aux demandeurs, comme il s'y est obligé par le bail, les effets dont ils réclament la possession par leur action ? Je ne le crois pas. Mais, en même temps, les demandeurs ne sont certainement pas propriétaires des effets, et ils ne peuvent pas obtenir la conclusion par laquelle ils demandent à être déclarés tels. Je ne crois pas non plus que je puisse maintenir la saisie-revendication, car la contre lettre, à laquelle la loi donne tout son effet entre les parties (C. C. 1212), les a empêché de devenir propriétaires des effets que leur a vendus le défendeur ; et, n'y ayant pas eu de tradition réelle ou d'appréhension des effets, ils ne sont pas gagistes et ne peuvent pas à ce titre les revendiquer. Le jugement condamne le défendeur à les leur remettre, et c'est tout.

Quant à la tacite reconduction, elle n'a pas lieu en fait de meubles. Quoique l'art 1609 de notre code qui y a trait soit rangé dans les dispositions générales s'appliquant à toutes les locations, le droit qu'il dit en résulter pour le locataire, de ne pouvoir pas quitter les lieux, ni en être expulsé sans congé, ne permet pas plus de doute sous ce rapport que l'art. 1759 du C. N.

qui ne la reconnaît que dans le bail des maisons et des appartements nommément, et l'art. 1788 du même code.

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JUGEMENT.

Considérant que si la contre-lettre et le bail en date du 29 septembre 1876, entre les demandeurs et le défendeur, et l'obligation consentie par le dit défendeur aux demandeurs le même jour, ont été à la vente qu'il leur a en même temps consentie de son matériel d'imprimerie; son caractère propre, ces actes et cette vente n'en constatent pas moins une promesse par le dit défendeur aux dits demandeurs d'un nantissement qui devait recevoir son exécution par la remise comme gage du dit matériel à l'expiration du susdit bail, si les dettes des demandeurs que ce nantissement devait garantir n'étaient pas alors payées et acquittées.

Considérant que cette promesse obligeait le dit défendeur à remettre le gage convenu au temps stipulé, et que sur son refus les dits demandeurs avaient action pour l'y contraindre, que les stipulations du bail sont suffisantes pour leur permettre d'obtenir la possession du dit gage sans préjudicier au droit que lui confère la contre-lettre de le dégager.

Considérant que le défendeur est encore en possession du gage promis, il est condamné à remettre sous quinze jours de la signification du présent jugement aux dits demandeurs le dit gage, avec dépens.

Andrews, Caron & Andrews, pour les Demandeurs.

G. M. Dechène, pour le Défendeur.

SUPERIOR COURT, QUEBEC.

24TH DECEMBER, 1877.

Coram McCORD, J.

LAPRISE v. METHOT.

HELD:—That a *défense en fait* to an action on a promissory note, if unsupported by affidavit, will be rejected on motion, as an insufficient denial and in violation of article 145 C. C. P.

Per curiam.—This is a motion to reject a *Défense en Fait* and a plea of no consideration, for want of an affidavit, the action being upon a promissory note.

Article 145, C. C. P., requires that “*every denial of a signature,*” shall be accompanied by an affidavit, such as mentioned in the article.

Article 1223, C. C., declares that “if the party against whom a private writing is set up, do not formally deny his writing or signature in the manner provided in the code of civil procedure, it, the writing (as a matter of interpretation), is held to be acknowledged.”

Article 1222, C. C., declares that private writings, held to be acknowledged have the same effect between the parties as authentic writings.

Ergo a *défense en fait*, without affidavit to an action on a promissory note, is perfectly useless, as not being a sufficient denial.

But it is nevertheless a denial, unaccompanied by affidavit, and therefore in contravention of article 145 ; it is consequently an irregular and illegal plea and may be rejected on motion.

I come to this conclusion, notwithstanding the case of *Mechanics Bank v. Seale*, 20 L. C. J., 196, the motives of which are not reported.

As to the other plea in this case, equivalent to a plea of no consideration ; it is not a “denial of a signature,” and therefore requires no affidavit, under Art. 145, C. C. P.

Motion granted as regards the *Défense en Fait*, and rejected as regards the Perpetual Exception. The whole without costs. Laprise
v.
Méthot.

Langelier & Langelier, for Plaintiff.

Bossé & Languedoc, for Defendant.

VICE ADMIRALTY COURT.

FRIDAY, 22ND NOVEMBER, 1878.

THE COMMODORE, MILNE.

Where a tug was seen from a barque at anchor crossing her bows and so suddenly stop her speed that she allowed her tow to drift upon and collide with the barque, and there appearing no fault in the tow, an action by the barque against the tow, the cause of neglect in the tug not being proved, was dismissed.

JUDGMENT.

HON. G. OKILL STUART.

This suit comes before the Court at the instance of the owners of the *Schelde*, Norwegian barque. It appears that on the 25th of May last, in the afternoon, the *Commodore* a vessel of 562 tons, laden and ready for sea, was anchored off Indian Cove on the south side of the river St-Lawrence, about four miles below the city of Quebec. There lay at anchor at the same time and place other vessels, the nearest of them to the *Commodore* being the *Dunrobin Castle*, outside on the starboard bow distant about a cable. At some distance below the *Commodore*, more to the east and further to the north side of the river, there lay the *Schelde* almost astern of the *Dunrobin Castle* but a little more to the south. She was steady to her anchor with her wheel a little aport which brought her bow slightly to starboard. While in these positions the *Commodore* had engaged the tug steamer *William* to tow her below the *Traverse*. The wind was strong from the east, the tide in the contrary direction half ebb. The tug accordingly was placed in front of the *Commodore*, and her steam power was applied by means of a tow line to assist in weighing her anchor.

The
Commodore,
Milne.

The sole cause of action assigned by the *Schelde* is that the *Commodore* after weighing anchor approached the *Schelde* in tow of the tug *William* apparently to cross the river from the south, and that about three minutes after she was seen crossing the *Schelde's* bow she came into collision and struck her jib-boom, while the bowsprit of the *Schelde* struck the *Commodore* on the starboard side, for which the *Commodore* was alone to blame.

The pleas are two:—1. That the collision was caused solely by the negligence of the tug which allowed the *Commodore* to drift on the *Schelde* and, 2nd, by the omission of the *Schelde* to starboard her helm.

The hawser by which the *Commodore* was towed was from 40 to 50 fathoms long. After her anchor was tripped her pilot directed the tug to go ahead, intending to go directly ahead of the *Dunrobin Castle*, instead of which she towed under her stern at a distance of about a cable. The tug seems in this and some other particulars not to have complied with orders from the pilot of the *Commodore*, this pilot did not object to the course so taken by the tug, as he considered it perfectly safe, and so it may be considered, as no exception has been taken to it, on the part of the *Schelde*. After the tug had passed the stern of the *Dunrobin Castle*, all she had to do was to go ahead by applying the necessary steampower, so as to take the *Commodore* clear of the *Schelde*, lying below. Instead of doing so she then relaxed her speed and the rope became slack. The *Commodore* canted to the tide and began to drift broadside towards the *Schelde*. When the tug had passed the *Dunrobin Castle's* stern, the chief officer of the *Commodore* called out to the tug to go ahead and in his own language, stamped the deck with rage and bawled out to them to go ahead. He has also said that he hailed the *Schelde* to starboard her helm, which would have avoided the collision. Again blame is attributed to the *William* by the pilot of the *Schelde*.

No evidence has been offered to show why it was that the tug allowed the *Commodore* to drift upon the *Schelde*. There is nothing to prove that it was an inevitable accident, and so far as the record shows to the contrary it may have either been from design or negligence. She did not act under the orders of the tow but contrary to them. There was no danger of collision until the tug relaxed her speed, and from that time there

was no act done by the *Commodore*, which contributed to the collision nor any omission on her part which led to or caused it. It by no means follows that because the *Commodore* was the proximate cause of damage she is to be made liable for it. Where the fault attaches to one exclusively, whether it be tug or tow, that one should be made liable, upon the principle that an innocent person should not suffer for the wrongful act of another, and where the fault attaches to both, they should be held jointly and severally liable. There exists a common obligation between them to make every reasonable effort to avoid danger and a common responsibility in case of neglect. (1) Were I convinced that the *Commodore* in any degree contributed to the collision, she would be held liable.

The
Commodore,
Milne.

It is possible that she may have done so, but it is not in evidence that she did. The persons who were on board the tug have not been examined, and therefore we have no justification of their conduct. It seems to me that they should have been, and in the absence of their testimony the presumption is that the owners of the *Schelde* thought it would be of no use to adduce it. (2)

On the 2nd plea it is unnecessary that I should come to a decision, as the case is disposed of under the first. I may, however, remark that when the *Commodore* was driving on the *Schelde* it was supposed, until almost the moment of collision, she might pass free, as thirty feet or thereabout would have been sufficient for the purpose, and had the *Schelde* starboarded her helm, it is probable that it would have been avoided; but the collision was so immediate after danger was apprehended there may not have been time to do it, and if there was it may have been an error but not a fault (3). Nothing but gross negligence will render a vessel at anchor liable for a collision. (4)

For the SCHELDE, *Blanchet & Pentland*.

For the COMMODORE, *Ross, Stuart & Stuart*.

(1) 14 Pickering, R. I. Sproul vs. Hemmingway, 6 New York Legal Observer, 435. 369. The John Counter, 1 Stuart R. 344.

(2) See the case of the *William*, *infra* where the cause of the collision appears.

(3) The Propeller *Genesee Chief* vs. *Fitchugh*. 12 How. Supreme Court U S.

(4) Pritchard's Digest *vo. Damage*, 407.

9 DECEMBRE 1878.

No. 1687.

Coram CASAULT, J.BREAKEY v. CARTER *et al.*

SENTENCE ARBITRALE—COMPROMIS

Jugé :—1. Que l'article 1346 du code de procédure civile n'empêche pas les parties de stipuler dans un compromis que les amiables compositeurs devront entendre les dites parties et leur preuve respective, ou les constituer en défaut.

2. Que ces conditions du compromis obligent les amiables compositeurs à peine de nullité.

3. Qu'un tuteur peut poursuivre et défendre les causes des mineurs, sans autorisation du conseil de famille.

Per curiam.—Action sur sentence arbitrale. Le compromis en date du 31 août 1877 nomme deux amiables compositeurs, et leur enjoint d'en nommer un troisième pour le cas de partage d'opinion. Il fait la sentence des deux, ou de l'un et du tiers arbitre obligatoire, et dit spécialement qu'ils pourront procéder sans autre preuve que celle qui sera devant eux, et en l'absence des parties, si celles-ci refusent ou négligent de se présenter et d'offrir leur preuve chaque fois qu'elles en seront requises. La défenderesse a informé un des arbitres qu'elle avait une preuve à faire ; mais on ne lui a jamais indiqué un jour ni un lieu où elle eut pu, soit produire ses preuves, soit être entendue. Un des arbitres a appelé le tiers arbitre, et sans que ce dernier ait entendu l'autre ou les parties, ils ont tous deux en l'absence de l'un des arbitres, et sans conférer avec lui, rendu la sentence dont le demandeur poursuit l'exécution.

Le demandeur invoque l'article 1346 du C. P., et soutient que cet article exempte les amiables compositeurs de la nécessité d'entendre les parties et leur preuve, ou de les constituer en défaut. En admettant que ce soit l'interprétation qui doit être donnée à l'article cité, elle suppose que les parties n'ont rien stipulé sur ce rapport ; car si elles peuvent étendre les pouvoirs

des arbitres, elles peuvent aussi les limiter. Ceux des amiables compositeurs comme ceux des arbitres, découlant du compromis même, sont astreints aux modifications, limitations et restrictions qu'il crée. La loi ne définit les pouvoirs que pour le cas où les parties ne s'en sont pas expliquées. Broakey
v
Carter et al.

Voir quant aux amiables compositeurs les nombreuses autorités citées par Sirey, code annoté. Procédure 1004 et suivants ; mais surtout 1009 et 1010.

Voir aussi 5 Dalloz, Rep. vbo arbitrage, p. 67, ch. 10, art. 3, No. 1019 à 1026-1028.

La défenderesse a, pour ces mineurs, opposé l'art. 307 du C. C. qui ne permet pas au tuteur de transiger sans l'autorisation du tribunal sur avis d'un conseil de famille. Mais compromettre n'est pas transiger.

Le C. P. 1842 donne la liberté de compromettre à tous ceux qui pourront légalement disposer des objets compris dans le compromis. Il s'agissait dans le cas qui nous occupe de dommages causés à la propriété du demandeur par l'inondation qu'avaient causée des travaux dans une rivière par une société dont le père des mineurs faisait partie.

Il est vrai que la jurisprudence et la doctrine en France ne reconnaissent pas le pouvoir de compromettre au tuteur, même lorsque le compromis n'a que des meubles pour objet ; mais l'art. 1004 du code de procédure français excepte du pouvoir de compromettre les contestations qui seraient sujettes à communication au ministère public, et l'art. 83 du même code soumet à la formalité de cette communication les causes des mineurs. Avec nous, le tuteur poursuit et défend les causes des mineurs sans autorisation, C.C. 304. Il n'en a besoin que pour appeler. C.C. 306.

Elle objecte aussi que les arbitres ont prononcé sur ce qui ne leur était pas soumis, en accordant les dommages faits au terrain, y compris le loyer du terrain. Ce loyer n'est qu'une partie du dommage souffert ; puis le compromis soumet toutes les difficultés relatifs aux terrains. Ces deux objections ne me paraissent pas fondées ; mais n'avoir pas donné aux parties l'occasion d'être entendues ou de produire leur preuve quand le compromis en faisait une obligation, l'appel par l'un des arbitres du

Breakay tiers-arbitre, avant que les deux amiables compositeurs nommés
v. par le compromis eussent pu délibérer sur les preuves et les dire
Carter et al. des parties qu'ils n'avaient pas entendues, et la sentence rendue
 par un des arbitres et le tiers arbitre en l'absence de l'autre
 arbitre et sans l'avoir entendu, non plus que les parties, sont des
 irrégularités dont la gravité rend la sentence nulle.

JUGEMENT.

Considérant que l'article 1346 du code de procédure civile n'empêche pas les parties de stipuler dans un compromis que les amiables compositeurs devront entendre, elles et leur preuve respective, ou les constituer en défaut, et que ces conditions du compromis obligent les amiables compositeurs, qui doivent s'y conformer, à peine de nullité ;

Considérant que le compromis en date du 31 août 1877, entre les parties en cette cause ne permettait aux amiables compositeurs qui y sont nommés de rendre leur sentence en l'absence des parties, et avant qu'elles eussent produit leur preuve, que sur leur refus ou négligence de comparaître et de produire leurs preuves quand requises, que les dites parties, et spécialement la dite Louisa Salmon Carter n'ont reçu aucun avis quelconque les requérant de produire leurs preuves, ni du jour, ni du lieu où les dits amiables compositeurs seraient prêts à les entendre et à recevoir leur preuve, et ce quoique la dite Louisa Salmon Carter eût informé l'un des dits amiables compositeurs qu'elle avait une preuve à faire ; que tant que les dits amiables compositeurs n'avaient pas, soit entendu, soit mis en demeure les parties de leur soumettre leur preuve, ils ne pouvaient pas passer outre ni délibérer, et qu'ils ne pouvaient pas par conséquent y avoir entre eux le partage d'opinion qui autorisait l'appel du tiers-arbitre, que la convention dans le dit compromis que les parties se soumettraient à la sentence des arbitres ou à celle de l'un deux et du tiers-arbitre, ne donnaient pas à ces derniers, même dans le cas où les deux arbitres nommés par le compromis auraient été partagés d'opinion, le droit de décider sans préalablement entendre les raisons et les motifs de dissentiment de l'autre arbitre ;

Considérant que la dite L. S. Carter n'a pas pu et n'a eu aucune occasion d'être entendue ni de produire ses preuves, qu'il n'y a eu de sa part ni refus ni négligence sous ce rapport,

et que la sentence arbitrale invoquée par le demandeur est sans valeur et nulle ; l'action du dit demandeur quant à la dite L. S. Carter en les deux qualités qu'elle est poursuivie, est renvoyée avec dépens.

Langlois & Campbell, pour le Demandeur.

Bossé & Languedoc, pour la Défenderesse.

COURT OF REVIEW, QUEBEC.

30TH NOVEMBER, 1878.

Coram MEREDITH, C. J., STUART, J., CARON, J.

NOLAN v. DASTOUS.

Held:—1. That the judgment of a judge in vacation respecting a *contrainte par corps* is susceptible of being reviewed.

2. That during the long vacation a judge has the same powers that he has at any other time of the year with respect to matters to be done out of term.

3. That an error in the date of the writ is not fatal.

4. That a question as to whether the Deputy Prothonotary is or is not of age cannot be raised incidentally, as attempted in the present case.

MEREDITH, C. J.—The judgment complained of rejected a petition of the defendant, praying to be liberated from imprisonment, under a *contrainte par corps* issued *after judgment*.

The learned counsel for the plaintiff contended that there was nothing to distinguish the judgment under review, from any ordinary order or judgment by a judge in vacation ; and that, such being the case, if the defendant had reason to complain of that judgment, he ought, as laid down by the Court of Appeals in *Béliveau v. Chemrefils*, (1) have sought redress by an application to the superior court in Term.

(1) 1st Que. Rep. p. 209, also *Canada Paper Co*, v. *Cary*, in appeal, June, 1878.

Nolan
v.
Dastous.

If the rule laid down by the court of appeals in *Béliveau v. Chevretils*, were applicable to the present case, we would not hesitate to follow it ; but we think that, in this matter, the judge in vacation, under art. 792, C. C. P., has a special jurisdiction such as is given in cases under the lessors and lessees act, and that, therefore, the defendant had a right to inscribe for review.

We are also of opinion that the judgment under review is a final judgment, and therefore pass to the consideration of the other objections urged by the defendant.

It appears that a wrong date is given in the writ of *contrainte par corps* to the judgment under which it issued, but in my opinion that ought not to be held fatal.

The second objection is that the order of the 28th November, 1877, had been obtained without any personal service on the defendant, of the notice of the motion, for that order.

The *contrainte par corps* was ordered by the judgment of the 12th of June, 1876, after personal notice to the defendant.

The first writ that issued under that order was lost. The plaintiff moved for a second writ, gave notice of the motion to the defendant's attorneys, by posting it at the office of the prothonotary, as they had not made an election of domicile within the district of Rimouski. In support of that motion an affidavit was made that after the argument upon the opposition, the writ of *contrainte par corps* was seen in the hat of the attorney of the opposant in the advocates' Library.

The court granted the motion, although there was no personal service of it, and we do not think that such service was indispensable.

The objections as to the alleged minority of the deputy prothonotary, who signed the writ, cannot be maintained because irrespective of the question of evidence, as properly contended by the plaintiff, the official status and rights of an officer of the court, in the actual and public possession and exercise of his office, cannot be incidentally questioned in the manner attempted in this case.

It was also contended that the rule of *contrainte par corps*, was not endorsed by the attorney or person by whom the writ had been sued out, as required by rule 78 of the rules of practice, but the writ is attested and signed in the manner required by art. 545 of our code of procedure; and that we deem sufficient.

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The last objection urged is that the judgment is null, having been rendered during the long vacation, but as the matter in question was to be determined out of term, we think the learned judge had the same power respecting it, during the long vacation, that he would have had, had it come before him at any other period in the year.

Some other technical objections are urged, but no authorities are cited in support of them; and we do not think they ought to be held fatal.

VICE ADMIRALTY COURT, QUEBEC.

FRIDAY, 6TH SEPTEMBER, 1878.

THE LAKE CHAMPLAIN, BERNSEN.

A schooner descending and a steamship ascending in the channel of the St. Lawrence; the former changed her course before meeting and in time to enable the steamship to keep out of her way: *Held*, in a case of collision, that the steamship was in fault for not doing so although had the schooner not changed her course each might have gone free.

JUDGMENT :

HON. G. OKILL STUART.

In this case the Canada Shipping Company owners of the steamship *Lake Champlain*, of 1437 tons, are sued by the owner of the schooner *J. Walters* of 176 tons, for damages the result of a collision in the river St. Lawrence a short distance below *Cape Charles* between the hours of eight and nine in the morning of the 29th May, 1877. The weather, at the time, was fine and clear, there was but little wind, from the west, the current was strong, and the tide nearly flood. The schooner sailing down the river

The
Lake Cham-
plain,
Bernsen.

had passed on the south side of a dredge anchored in mid channel a very short distance above *Cape Charles* and when about opposite the Cape, she gybed her sails from starboard to port, and on the port tack commenced crossing the channel diagonally on a northerly course. At the same time the *Lake Champlain* was approaching the schooner from below and the one had been seen from the other distant about two and a half miles. When the schooner gybed she was about 100 or 150 feet below the dredge and after that had reached a buoy on the opposite or north side of the channel making about a knot and a half an hour. So soon as she was at or a little below the buoy, the *Lake Champlain*, from a course in about the middle of the channel, had crossed to the north side and there her stern came into contact with the starboard bow of the schooner and so injured her that she was beached. Previous to the collision the *Lake Champlain* had been making slow progress awaiting high tide to cross the bar at the cape, possibly not more than three knots, and altho' she reversed her engines before coming into collision she had headway on when it happened.

On the side of the *Lake Champlain* it has been said that the schooner should not have gybed her sails as this brought her across the path of the *Lake Champlain*, but that she should have kept her course and have gone outside of the deep channel in which the steamer was, and on the south side where there was a sufficient depth of water for her, in which case the two would have passed, port side to port side, with safety. This view of the case I believe to be so far accurate that had the schooner not gybed but gone into shallow water, the two might possibly have gone free, but I am not at liberty to acquiesce in it for the reasons I am about to state. The case is to be governed by the 15th sailing rule which provides that "where a sailing ship and a steamship are proceeding in such directions as to involve risk of collision the steamship shall keep out of the way of the sailing ship," and also by the 18th rule which requires that "the sailing ship shall keep her course." An application of the 18th rule does not make it necessary that a sailing vessel should, when, at an indefinite distance, she is approaching a steamship, continue her course, altho' at the end if prolonged it might avoid a collision. On the contrary it is within the power of the sailing vessel to change her course, and her destination may require that she

should, if she allows ample time and space to the steamship to keep out of her way, she all the time afterwards keeping her new course. If the *J. Walters* did within so short an intervening space and within so short a time gybe her sails as to cross the *Lake Champlain* so suddenly that she could not keep out of her way this suit must fail; while, on the contrary, if after gybing, time and space were afforded the *Lake Champlain* to avoid the schooner, she is answerable for the consequences. In determining the points on which the parties are at issue I have been in a great measure, guided by the evidence of two witnesses examined on the side of the *Lake Champlain*, one is her master and the other the master of the dredge. According to the former the schooner gybed her sails when about opposite *Cape Charles* and when the *Lake Champlain* was at a distance of about 700 yards below the dredge on the south side of the channel, and the collision took place within about four feet of the buoy on the north side of it. The master of the dredge, who had been stationed at the place for some time and who must necessarily be familiar with the spot, has said that when the schooner began to cross the channel the *Lake Champlain* was below the buoy which marked the north side of the channel, and that from this buoy the dredge was distant about two thousand feet, and the collision took place below the buoy to the best of his knowledge at a distance from 100 to 150 feet and about twelve or fifteen minutes after the schooner had passed the dredge. Taking these statements together it is plain that the *Lake Champlain* was distant not only the 700 yards given by her master, as the space between her and the schooner when he saw the latter gybe her sails at the dredge, but more because his vessel was in motion crossing from mid channel to the north simultaneously with the schooner until each reached the spot where they collided near the buoy. It has not been satisfactorily explained why the steamship directed her course to a point on the north side of the channel to which the schooner's course was directed, instead of to one in mid-channel or on the south shore which the schooner was leaving, and which would have taken her astern of the schooner each passing starboard to starboard. The space and time which have been given, namely more than 700 yards and nearly a quarter of an hour, appear to have been sufficient for the purpose, and this opinion is concurred in by the nautical assessors by whose experience I am guided. Being asked if after the *J. Walters* had gybed

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Lake Cham-
plain,
Barren.

The
Lake Cham-
plain,
Bernsen.

her sails and had come on the port tack it was in the power of the *Lake Champlain* to have kept out of her way by the exercise of ordinary care, they say that it was. And again, referring to the fact that the schooner starboarded and then ported her helm just before the collision, they have been asked whether after the change of course, the *J. Walters*, by porting or starboarding, contributed to the collision, and they have said "the schooner was helpless and the course taken on board of her was to ease the blow and did not contribute to the collision."

It is no doubt extremely annoying for the master of a large steamship to be hampered in his movements by a vessel, comparatively insignificant in size; and altho' it is quite possible, perhaps certain, that there would have been no collision had the *J. Walters* kept her course outside of the channel on the south side, this court has no discretion to exercise by deciding that she should have done so. The law is absolute in requiring that the *Lake Champlain* should have kept out of the way of the *J. Walters*, and it imposes on this court the duty to protect from injury any vessel, however small, while in the exercise of a legal right as in this case the schooner was, whatever inconvenience or delay she may have occasioned to the steamship. The decree is for the damage sustained by the schooner, to be ascertained as usual, and costs.

For the *J. WALTERS*, *Andrews, Caron & Andrews*.

For the *LAKE CHAMPLAIN*, *Langlois, Angers & Larue*.

COURT OF QUEEN'S BENCH,—APPEAL SIDE.

QUEBEC, 8th MARCH 1878.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.BRUNELLE *et al.*, v. LAFLEUR, *in re* BEAUCHENE.INSOLVENCY—CADASTRAL REGISTRATION—PRIORITY OF
HYPOTHEC.

Where the delay for renewing registrations under the cadastre expired between the date of the debtor's insolvency and the sale of his lands by the assignee,

HELD :—That a bailleur de fonds claimant who had not renewed the registration of his hypothec, would nevertheless be collocated by preference to a mortgagee who had enregistered under the cadastre but whose hypothec was subsequent in point of time to that of the said bailleur de fonds claimant, as, at the date of the insolvency, the latter's delay to renew had not expired, and no renewal of registration could have affected the lands after they passed into the hands and possession of the assignee, and even had such a renewal been made it would not appear by the registrar's certificate, which in matters of insolvency would only show registrations up to the date of the attachment or assignment and not (as under 689 C. C. P.) up to the day of sale.

The judgment appealed from was rendered by POLETTE, J., at Three-Rivers, on the 14th August, 1877, as follows :

“ Après avoir entendu deux des parties susnommées, Louis Joseph Onésime Brunelle et Louis Brunelle, créanciers colloqués, et Louis Hercule Lafleur, créancier contestant, par leurs avocats sur le mérite de la contestation faite par le dit créancier contestant de cette partie du bordereau de dividende fait et produit par le syndic en la présente affaire, par laquelle il est accordé deux sommes de deniers aux dits créanciers colloqués, et de la réponse de ces derniers à icelle contestation, examiné ces contestations, réponse et bordereau de dividende, les réclamations de ces deux parties et les documents sur lesquels elles sont appuyées, les admissions, consentement et déclarations des dites parties, ainsi que le dossier de la procédure, et en avoir délibéré ;

“ Attendu que le créancier contestant a objecté au bordereau de dividende par une contestation qu'il a fait signifier aux créanciers colloqués, par laquelle il allègue, entr'autres choses, 1o que ces derniers n'ont pas droit au rang d'hypothèque qui

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la re
Benuchène.

leur est accordé par le bordereau de dividende du syndic, parce que l'hypothèque qu'ils réclament leur a été consentie avant le cadastre du comté de Nicolet, et que l'enregistrement d'icelle n'a pas été renouvelé ; 2o parceque l'hypothèque consentie à lui dit contestant le 20 de mai mil huit cent soixante et quatorze, a été enregistrée conformément à la loi du cadastre et aux lois existantes lors de cet enregistrement, sur le même immeuble du failli que celui sur lequel les créanciers colloqués prétendent droit d'hypothèque ; pourquoi il conclut à ce que le bordereau de dividende soit modifié et changé, de manière à ce qu'il, dit créancier contestant, soit colloqué, et mis en ordre par préférence aux créanciers colloqués ;

" Attendu que par leur réponse à cette contestation, les créanciers colloqués disent entr'autres choses ; 1o que le créancier contestant n'a pas produit de réclamation fondée sur l'acte d'obligation allégué en sa contestation et produit, ni de réclamation prouvée suivant la loi ; 2o que l'hypothèque mentionnée en cet acte d'obligation est nulle, attendu que l'immeuble vendu en cette affaire, n'a pas été indiqué dans icelui acte par le numéro sous lequel il est désigné dans le plan officiel et livre de renvoi du cadastre de la paroisse de St. Wenceslas ; 3o que lors de la passation de l'acte d'obligation en question, le failli était, et depuis longtemps avant, insolvable, et ce à la connaissance du créancier contestant ; 4o que lorsque les créanciers colloqués ont produit leur réclamation, et aussi lorsque le syndic a annoncé la vente de l'immeuble dans les gazettes, le délai pour renouveler l'enregistrement des hypothèques n'était pas expiré ; pourquoi ils concluent, à ce que l'hypothèque implorée par le créancier contestant soit déclarée de nul effet, quant à leur droit de privilège d'hypothèque ; au débouté de la contestation ; et à ce que la collocation faite en leur faveur par le bordereau de dividende soit maintenue ;

" Attendu qu'il est admis par ces dites parties, 1o que leurs réclamations respectives ont été fournies au Syndic avant le dix-neuf d'avril, mil huit cent soixante et quinze : et 2o que les plans et livres de renvois officiels des paroisses du comté de Nicolet, ont été déposés au bureau d'enregistrement de ce comté, le ou vers le dix de juillet, mil huit cent soixante et treize ; que les délais pour renouveler les hypothèques dans ce comté ont commencé à courir le quinze du même mois de juillet mil huit

cent soixante et treize, et sont expirés le quinze de juillet mil huit cent soixante et quinze ;

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" Considérant I. que la réclamation du créancier contestant, est de quinze cent vingt-neuf piastres, et trois centins, pour billets promissaires, suivant état de compte y annexé, et qu'il y est déclaré qu'il possède une hypothèque au montant de mille piastres pour sûreté de cette réclamation jusqu'à concurrence du montant porté en l'obligation, laquelle réclamation a été attestée sous serment le quinze d'avril, mil huit cent soixante et quinze, et est prouvée suivant les exigences de l'acte de faillite de 1869, section 122, alors en vigueur ; que par le dit acte d'obligation qui est pour mille piastres pour valeur reçue avec hypothèque spéciale sur l'immeuble susmentionné, il est entr'autres choses stipulé, que le failli donnerait ses billets promissaires au créancier contestant à sa demande, lesquels n'opèreraient aucune novation de l'obligation et hypothèque ;

" II Que l'immeuble vendu en la présente affaire, sur lequel les deux parties réclament hypothèque, a été désigné dans le dit acte d'obligation sous le numéro qu'il porte dans le cadastre dans le comté de Nicolet, pour la paroisse de St. Wenceslas, où il est situé, et que ce même acte a été enregistré le dix-neuf de janvier mil huit cent soixante et quinze au bureau d'enregistrement du dit comté, après le dépôt fait à ce bureau d'enregistrement des plans et livres de renvoi de ce comté pour la dite paroisse, suivant le Code Civil, article 2168, ce qu'établit suffisamment d'ailleurs le certificat des hypothèques sur cet immeuble délivré par le Régistrateur d'icelui comté, sur réquisition à lui faite par le Syndic, lesquels certificats et réquisition sont produits en la présente affaire ;

" III. Que le créancier contestant n'était pas même obligé de faire de réclamation par écrit pour recouvrer le montant de son hypothèque, attendu que par l'acte de faillite de 1869, section 49, l'acte de faillite de 1875, sect. 77, et le Code de Procédure Civile, articles 719 et 727, le certificat des hypothèques sur l'immeuble en question délivré par le Régistrateur, lui suffisait pour être colloqué suivant le rang et la date de son hypothèque, sans qu'il fut nécessaire de faire aucune demande ou réclamation à cette fin ;

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" IV. Que les créanciers colloqués n'ont pas prouvé que le failli fut insolvable lors de la passation de l'acte d'obligation, ni les autres allégation essentielles de leur réponse à la contestation du créancier, contestant ;

" V. Que l'acte de vente sur lequel est basée la réclamation des créanciers colloqués, et par lequel ils prétendent droit d'hypothèque, a été enregistré le deux de septembre, mil huit cent soixante et douze, suivant les lois et le mode d'enregistrement, qui existait alors, et avant qu'il eut été déposé au bureau d'enregistrement pour le comté de Nicolet, de plans et livres de renvoi pour les paroisses de ce comté, suivant le code civil, article 2168, comme il résulte des admissions données par écrit des dites parties ;

" VI. Que le délai fixé par le même code, article 2172 et prolongé à deux ans par l'acte de la législature de cette province, 35 Vic., cap. 16, sec. 4, pour renouveler l'enregistrement de tout droit réel sur un lot de terre, dans les paroisses du comté de Nicolet, est expiré le quinze de juillet, mil huit cent soixante et quinze, suivant les dites admissions ; que l'immeuble en question sur lequel les dites parties prétendent droit d'hypothèque, n'a été vendu et adjugé par le syndic sur le failli, qu'après l'expiration de ce délai, savoir : le vingt-trois d'août suivant, et qu'il ne paraît aucunement par le certificat des hypothèques délivré par le registrateur du comté de Nicolet, ni autrement, que l'enregistrement de l'acte de vente sur lequel les créanciers colloqués fondent leur prétention, et de l'hypothèque y mentionnée, ait été renouvelé avant ou au moment de l'expiration du délai pour le faire, savoir, le ou avant le quinze de juillet mil huit cent soixante et quinze, ni même après ;

" VII. Que la faillite déclarée, de même que la saisie d'immeubles hypothéqués, n'ont pas l'effet d'exempter de la nécessité de renouveler l'enregistrement des hypothèques créées sur les immeubles du failli, ni sur ceux saisis, lorsque le délai pour le faire expire après la faillite ou la saisie, et que la vente et adjudication seule exempte de ce renouvellement, si le délai n'est pas encore expiré, parce qu'alors les immeubles hypothéqués passent en d'autres mains dégrévés d'hypothèques, et que l'inscription ou la transcription produit son effet, en donnant aux créanciers le moyen de se faire payer à même le prix de vente,

suivant leurs droits ; qu'il peut arriver que le failli et le saisi empêchent la vente d'avoir lieu, le failli en obtenait un acte de composition et décharge, et le saisi en payant le saisissant ou s'arrangeant avec lui ;

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" VIII. Que le délai pour renouveler l'enregistrement de l'hypothèque à laquelle les créanciers colloqués prétendent avoir droit, étant expiré avant la vente et adjudication de l'immeuble hypothéqué, cet enregistrement qui n'a pas été renouvelé, n'a aucun effet à l'égard du créancier contestant dont les droits ont été régulièrement et légalement enregistrés ; d'où il suit que les créanciers colloqués n'ont pas droit aux sommes à eux accordées par le syndic dans et par le bordereau de dividende susmentionné ; qu'ainsi et pour toutes ces raisons, la contestation du créancier contestant est bien fondée ;

" En conséquence, je, soussigné, l'un des juges de la cour supérieure, dans et pour la province de Québec, maintiens la dite contestation, adjuge et ordonne que le dit bordereau de dividende ainsi fait et produit par le dit syndic Adolphe Odilon Houle, soit modifié et réformé, en tant qu'il s'agit seulement des deuxième et troisième items de la distribution d'icelui, l'un de cent soixante-quinze piastres, et l'autre de dix piastres accordés aux dits Louis Joseph Onésime Brunelle et Louis Brunelle, et qu'un nouveau bordereau de dividende soit préparé et produit en diligence par le dit syndic, par lequel il accordera ces deux items, se montant ensemble à cent quatre-vingt-cinq piastres au dit Louis Hercule Lafleur, de préférence aux dits Louis Joseph Onésime Brunelle et Louis Brunelle, avec les deux dernières sommes se montant ensemble à cent trente-une piastres et quatre-vingt centins déjà accordées au dit Louis Hercule Lafleur, et condamne les dits Louis Joseph Onésime Brunelle et Louis Brunelle aux dépens de la dite contestation et autres par eux occasionnés, envers le dit Louis Hercule Lafleur, lesquels dépens sont accordés par distraction à Messieurs Gervais & Gérin, procureurs de ce dernier.

" A. POLETTE,"

" J. C. S."

An appeal having been taken from the foregoing judgment, *Bureau* was heard for the appellant, (with him *G. Doure*), and *Gérin* for the Respondent.

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The appellants referred to civil code, articles 2090, 2091. The following authorities were cited on behalf of the Respondent.

1. Arrêt de Cassation du 17 juin, 1817, *Meyer v. Héritiers Schamb* qui décide que renouvellement est indispensable, lors même que le débiteur est en faillite, et qu'un tel évènement ne suffit pas pour prolonger l'effet des inscriptions.

2. Arrêt de Limoges, du 26 juin, 1820, *Héritiers Calignon v. Syndics de la faillite Bertrand*.

3. Arrêt de Caën du 19 février 1825, *Poignant et al. v. Bureau de Bienfaisance de Cheux*.

Plusieurs arrêts vont même à dire que l'inscription ne produit son effet que par la distribution des deniers, et que l'inscription doit être en force jusque-là soit qu'elle subsiste par l'enrégistrement ou par le renouvellement de l'enrégistrement à l'expiration des dix ans.

4. Arrêt de Dijon, 26 février, 1819, *Isnard v. Créanciers Cannot*.

5. Arrêt de Rouen du 30 Mai 1825 *Touet v. Sébire*.

Il en est de même des immeubles vendus sur exécution, mais ici les arrêts décident que l'inscription produit son effet par la vente et adjudication, pourvu que les dix ans de l'enrégistrement ne soient pas expirés ou que cet enrégistrement ait été renouvelé.

6. Arrêt de Bruxelles, du 26 Juin, 1813, *Mathieu v. Demarez*.

7. Arrêt de Grenoble du 8 Avril, 1829, *Bouvat v. Macors*;

8. Arrêt, de Cassation du 7 Juillet, 1829, Enrégistrement, *Demailly v. Duretz*.

9. Arrêt de Toulouse du 18 Juin, 1830, *Rufflé v. Buc*.

10. Arrêt de Grenoble du 28 Février, 1831, *Denis v. Charras*.

11. Arrêt de Cassation du 14 Juin, 1831. *Romien v. Forcat et Férand*.

2ème. Hervieu. Privilèges, hypothèques. Du renouvellement

d'inscription, No. 2 p. 714 No. 9, p. 716, No. 13 p. 717, No. 14, p. 718, et No. 18 p. 719.

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3ème. Troplong. Privilèges, Hypothèques, No. 660 bis, p. 53 et suivantes. No. 719, p. 196 et suivantes.

1er. Grenier, Hypothèques, 1ère Part. chap. 1. Sec. 2 § 3. p p. 214, 215 & 216 et aussi 236.

3ème. Battur. Hypothèques, Part. 2, chap. 3, Sec. 3, p p. 237, 238 et 449.

2ème. Persil. Régime Hypothécaire, sur l'art. 2154 du Code Nap, p. 99.

20ème. Duranton, No. 168, p p. 274, 275, et 276.

11ème. Marcadé & Pont, Privilèges et Hypothèques, No. 1054, p. 431, No. 1055, p. 433.

2ème. Zachariæ par Aubry & Rau, 2, Liv. 1 § 280 p. 816.

5ème. Bravard Véryrières, par Demangeot, Droit Commercial p. 283 (note 1)

8ème. Merlin, Répertoire, Vis. Inscription Hypothécaire, § 8 bis. p p. 274, 275 276 & 277,

1er, Sirey. Codes annotés. sur l'art. 2154 du Code Nap. Note 7 p. 993 et suivantes et notes 12 & 24.

Bourassa v. McDonald, Jugt. 10 Mars, 1871, 16, L. C. J. p. 19.

The judgment of the Court of Appeals is as follows :

The Court, &c. Considering that in virtue of the assignment made on the 1st April 1875, by François Beauchene, of the parish of St. Wincelas, in the county of Nicolet, trader, under and in conformity to the insolvent act of 1869, to Adolphe Odilon Houle, official assignee, residing in the parish of St. Celestin, the estate property rights and effects of the said François Beauchene including the immoveable property whereof part of the proceeds are the subject of dispute in this matter, were transferred to and became vested in the said A. O. Houle, as such assignee, for the benefit of the creditors of him the said F. Beauchene, to be by

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the said assignee, realised and paid to the said creditors, according to the rank, priority and nature of their claims respectively.

Considering that the respective claims of the appellants and respondent were duly made and produced to the said assignee before the 19th day of April 1875, the claim of the appellants being for one hundred and seventy-five dollars currency and interest due to them for balance of price ; under a certain deed of sale, from them the appellants, to one Joseph Rheault the younger, of the said parish of St. Wincelas, farmer, and from the said Joseph Rheault to the said insolvent François Beauchêne, executed before T. E. Normand, notary, the 26th day of August 1872, affecting said property by hypothec and privilege of bailleur de fond, said deed of sale, being duly registered on the 2nd of September, 1872, a date anterior to the deposit, of the official plans and book of reference for registration purposes, in the said county of Nicolet : and the claim of the respondent being based upon an obligation with hypothec, applicable to the same immoveable property, for the sum of one thousand dollars, executed before Louis A. DesRosiers, notary public, on the 20th day of May 1874, and duly registered the 19th day of January 1875, by the cadastral number eighty-one (81) by that time given to the said immoveable property on the official plan, and in the book of reference, for the said county of Nicolet.

And considering that in the dividend sheet, made and produced in this matter by the said assignee, the appellants were collocated upon the proceeds of the said immoveable property, their said claim of one hundred and seventy-five dollars currency, with a further sum of ten dollars currency for interest accrued thereon, which collocations were contested by the Respondent ; such contestations being maintained by the judgment now appealed from, which was rendered by the superior court, sitting in matters of insolvency at Three Rivers on the 14th day of August 1877, and said collocations of said appellants thereby set aside.

And considering that although the said immoveable property was only sold by the said assignee on the 23rd day of August 1875, before which date, to wit, on the 15th day of July 1875, the delay for renewing the registration of hypothecs, in the said county of Nicolet, in conformity to article 2172 of the

civil code for Lower Canada, had expired, and the said hypothec and privilege of the said appellants had not then been renewed, yet at the time when the said assignment was so made, to the said A. O. Houllé, as such assignee, in manner as aforesaid, and at the time when said claims of the appellants and respondent were so made and produced to the said assignee in manner as aforesaid, no necessity existed for the renewal of the registration of the said hypothec and privilege of the appellants : nor could any such renewal have affected the said immoveable property, so in the hands, possession and power of the said assignee for the purposes aforesaid, and considering that the said assignee was not bound as in the case of sheriff's sale, to procure in compliance with article 669 of the code of civil procedure for Lower Canada, from the registrar of the registration division, in which the immoveable was situate, a certificate of the hypothecs charged upon such immoveable, and registered up to the day of sale, but was only bound in conformity with section 49 of the insolvency act of 1869, to procure from the registrar of the registration division in which the said immoveable property was situate, a certificate of the hypothecs, charged upon such immoveable, and registered up to the day of the issue of the writ of attachment, or of the deed of assignment, by which the insolvent was brought within the purview of the said act, which in the present instance, would not have shewn a renewal of the registration of the said hypothec and privilege of the appellants, in case it had been actually renewed subsequent to the date of the said assignment, and prior to the expiration of the delay for such renewal ; and considering that at the time the appellants so made and produced their said claim, they did all that could have reasonably been required of them, to entitle them to be collocated as for their said privilege of bailleur de fonds.

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And considering that in the said judgment so rendered by the said superior court at Three-Rivers, on the said 15th day of August 1877, there is error : The Court of Our Lady the Queen now here, doth reverse, annul and make void the said judgment.

And proceeding to render the judgment which the said superior court ought to have rendered, doth over-rule and dismiss the said contestation of the said respondent, and doth maintain the said collocation of the appellants in the aforementioned dividend sheet, for the said sum of one hundred and seventy-five

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dollars, and for the said additional sum of ten dollars currency of interest as aforesaid, and doth condemn the respondent to pay the costs as well in this court, as in the court below.

Dissentientibus : The Honorable Chief Justice DORION.

The Honorable Mr. Justice TESSIER.

Judgment reversed

Bureau, for Appellants. With him, *Doutre*.

Gérin & Gervais, for Respondent.

COURT OF QUEEN'S BENCH,—APPEAL SIDE.

QUEBEC, 7TH DECEMBER, 1878.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J

REGINA v. DUGAL.

MANSLAUGHTER—DEATH CAUSED BY TERROR.

HELD :—That death resulting from fear caused by menaces of personal violence and assault, though without battery, is sufficient in law, to support an indictment for manslaughter.

The prisoner was indicted for manslaughter. It appeared that he had a quarrel with his brother, that the deceased, prisoner's father, took the part of the brother, that the prisoner, having been stopped from fighting with his brother, advanced in a threatening attitude to within two or three feet of deceased, and with violent words and menaces, and a table knife in his hand, declared that he would have done with deceased. He was prevented by the bystanders from striking deceased, who was removed in a state of great agitation and weakness, and within twenty minutes afterwards died of syncope. On these facts the jury found a verdict of guilty. The Court of Appeals, on a case reserved, sustained the verdict.

The prisoner having been convicted of manslaughter at the October term of the Court of Queen's Bench, holding criminal pleas, at the city of Quebec, the following case was reserved by Mr. Justice TESSIER :

J'ai cru de mon devoir de réserver le point de droit suivant pour la décision de la Cour du Banc de la Reine, siégeant en appel.

L'acte d'accusation est comme suit : "Quebec to wit : "The
 "jurors for Our Lady the Queen upon their oath present that
 "Cyrille Dugal on the twenty-eight day of May, in the year of
 "Our Lord one thousand eight hundred and seventy-eight, at
 "the city of Quebec, in the district of Quebec, did feloniously
 "kill and slay one Ignace Dugal, against the peace of Our Lady
 "the Queen, her Crown and Dignity."

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L'accusé a plaidé *non-coupable* et a eu son procès le treize novembre courant.

Après preuve produite de la part de la Couronne, Mtre. *Frémont*, avocat de l'accusé, a pris l'objection qu'il n'y avait pas d'après la preuve faite, un crime d'homicide (manslaughter) tel que porté dans l'acte d'accusation, parce que la frayeur seule, causée par des menaces d'injure corporelle, en supposant qu'elle eût causé la mort d'Ignace Dugal ne constitue pas un crime d'homicide *non prémédité*, (manslaughter) d'après nos lois.

La cour a alors ordonné à l'accusé de procéder à sa défense, et que s'il y avait lieu, elle réserverait cette objection pour la décision de la Cour du Banc de la Reine siégeant en appel.

L'accusé a procédé sur cela à sa défense et le jury a rendu un verdict de *coupable*.

Le lendemain matin (14 novembre), la cour a suspendu la sentence et réservé l'objection à la décision de cette cour siégeant en appel.

D'après la preuve il a été établi que le vingt-huit mai dernier, en la cité de Québec, l'accusé Cyrille Dugal qui ne demeurait pas ordinairement dans la maison de son père, mais qui y allait souvent, y est allé ce jour là. Ignace Dugal, son père, a appelé un de ses voisins chez lui. Ce voisin Charles Robin, témoin examiné en cette cause, a dit : "J'ai trouvé le prisonnier sur son frère Joseph le tenant à terre. J'ai ôté le prisonnier de dessus son frère. Après s'être ainsi levé le prisonnier a pris un couteau dans un tiroir, on le lui a ôté ; il a voulu en prendre un autre, je l'en ai empêché. De là son père a dit : "envoyez-le, le misérable." Le prisonnier a dit à son père "*mon vieux Christ, c'est aujourd'hui le bout.*" Le prisonnier était excité, il a parti pour fesser (sic) son père avec les mains levées. Je me suis alors mis

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“ entre les deux et je lui ai dit : “ tu ne toucheras pas à ton père.” Il ne restait pas alors plus que 2 à 3 pieds de distance entre le père et le fils (le prisonnier). Le prisonnier aurait frappé son père, s'il n'en eut pas été empêché. Je lui ai dit de se tenir tranquille, j'ai pris le père en l'emmenant vers l'escalier, le père s'est affaibli, il descendait à peine l'escalier avec mon aide. Je l'ai amené à la maison voisine, il a à peine parlé et est mort environ vingt minutes après les menaces du prisonnier à son père.”

Ces faits ont été corroborés par d'autres témoins, l'un deux a dit, savoir le nommé Adolphe Sirois, “ que dans cette occasion le prisonnier tenait Joseph Dugal, son frère, à terre, une main sur son pied, l'autre main sur sa chaîne de montre, et que cette montre appartenait à Joseph Dugal.” Un autre témoin Victor Darveau a ajouté. “ Je crois que le père était en danger, quoiqu'il y eut sept hommes présents, parce que le prisonnier eut pu donner quelque coup de traître.”

Il a été prouvé que le prisonnier était âgé d'environ vingt-quatre ans, et le père défunt d'environ soixante-trois ans.

Deux médecins ont été examinés comme témoins sur la cause de la mort et n'ont pas été contredits. Le Dr. C. C. Lemieux, examiné comme témoin a dit : “ J'étais depuis longtemps le médecin du défunt Ignace Dugal et sa famille. Le jour de sa mort je l'ai vu. Le lendemain j'ai fait l'autopsie de son corps. Je n'ai trouvé sur le corps aucune marque de violence, les organes étaient sains. Les deux cavités du cœur étaient gorgées de sang, ce qui est toujours le cas, lorsque la mort a lieu par syncope. La syncope a lieu, lorsqu'un individu perd connaissance. Dans la syncope véritable la circulation du sang et la respiration sont arrêtées. Le défunt a dû avoir une syncope qui a causé la mort. Il y avait élargissement du cœur, mais pas assez pour causer la mort.

“ Le défunt était faible, pâle, mais jouissant d'une assez bonne santé, il ne s'est jamais plaint d'une maladie de cœur.

“ D'après les témoignages que j'ai entendues en cette cause, la syncope a été causée par la peur que le défunt a eue d'être assassiné par son propre fils.

" Pour un homme comme M. Dugal, un peu faible, les menaces du fils ont pu causer la mort de son père.

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" Un homme d'une intelligence ordinaire peut comprendre que la peur peut causer la mort.

" Connaissant le défunt je dis positivement que la peur des menaces de son fils a causé la syncope et la syncope a causé la mort du défunt. L'élargissement du cœur n'a pas été la cause de la mort dans ce cas-ci."

Le docteur Michel Fiset a corroboré le témoignage précédent.

Je soumets donc la question de savoir, si d'après ces faits qui ont été prouvés et qui ont été appréciés par le jury comme prouvés, il y a en loi un *homicide non prémédité (manslaughter)* dans ce cas-ci, et je demande à cette Honorable Cour de vouloir bien prononcer tel ordre, jugement ou sentence qu'elle trouvera à propos.

(Signé), U. J. TESSIER,
Juge C. B. R.

SIR A. A. DORION, C. J., *dissentiens*.

This is a reserved case. The question to be decided is whether a person who by threats of violence amounting to an assault, but without inflicting any blow or corporal injury causes the death of another by frightening him, is guilty of manslaughter.

The act of a person causing the death of another by fear, anger or grief does not in ordinary circumstances constitute murder or manslaughter. To constitute either offence the death must be the immediate consequence of some physical or bodily injury.

In the case of *The Queen v. Murton*, 3 Foster and Finlayson, 492, Judge BYLES, addressing the jury, said :

" Within a few hours of her death, the woman said that her husband had caused her death, but to some of the witnesses, she said that he had broken her heart, and that being turned

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" out of her home, had caused her death. Taken together, these dying declarations are, perhaps, more in favour of than against the prisoner ; for if the woman died of a broken heart, and from anguish at being turned out of her home, it would not be a case of manslaughter. To constitute that crime there must be some physical or corporal injury, negative or positive as a blow, or the deprivation of necessities or the like ;" and further on he said : " mere unkind or unhusbandlike usage is not enough, and there must be violence, physical or corporal. If the being treated so and turned out of her home preyed upon her spirits and broke her heart, it is not a case of manslaughter and human tribunals can take no cognisance of it as a criminal offence."

In a more recent case, that of *The Queen v. Towers*, 12 Cox p. 580, Mr. Justice DENMAN, said :

" They could not commit murder upon a grown up person by using language so strong or so violent as to cause that person to die. Therefore mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidation had been held to be murder. If for instance four or five persons were to stand round a man, and so threaten him and frighten him, as to make him believe that his life was in danger, and he were to back away from them, and tumble over a precipice to avoid them, then murder would have been committed. Then did or did not this principle of law apply to the case of a child of such tender years, as the child in question ? For the purpose of the case he would assume, that the law about working on people by fright did not apply to the case of a child of such tender years as this."

While Judge DENMAN made a distinction between the rule applicable to a child a few months old, and that applicable to a grown up person, which distinction cannot be easily defended on principle, yet he fully admitted the general doctrine as expressed by all the writers on criminal law, that there must be some external violence or corporal injury, and that when a person by harsh and unkind usage puts another into such a passion of grief or fear that he dies suddenly, the killing is not such as the law can notice. 1 Russell, 674-675. 1 Hale, Pleas of the

Crown, 429. 1 East, 125. 3 Chitty Crim. Law, 726. 2 Starkie Law of Evidence, 710. 2 Deacon's Digest Crim. Law 900.

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It has been suggested that a distinction must be made between cases where the fear which produced the death is caused by mere menaces without assault, and where the menaces amount to an assault. I have not been able to find that any such distinction exists in law. An assault is not a necessary ingredient of either murder or manslaughter. (*Rex v. Bird*, 5 Cox p. 1, and cases cited in Clarke's Crim. Law, pgs. 272 and 273). I do not therefore see why a simple assault which is exclusive of blows or personal violence of any sort, can alter the rule which requires some physical or corporal injury to constitute one or other of these crimes.

I am strengthened in this view by the fact that in both of the cases above referred to, an assault accompanied by great personal violence had been committed, in the first, against the person whose death was the occasion of the prosecution, and in the other, against the nurse who held the child whose death was supposed to have been caused by the fear consequent on the assault; yet, in neither case, did the learned judges who so strongly laid down the rule that he who caused the death of another through fear or anguish could not be held guilty of either murder or manslaughter, make any allusion to the assault as altering the rule. If it did so, it would lead to this consequence, that he who would create such a fear in the mind of another as to cause his death by menaces uttered at a distance from which he could strike him, would be guilty of murder or manslaughter, while he who would create the same result by the same threat made at a distance of a few feet more, would commit no offence cognizable by Courts of Justice.

I do not think, that we ought, in so delicate a question and in the absence of any precedent to that effect, to decree that by producing such a fear on the mind of his father as to cause his death, the accused has been guilty of manslaughter. I would therefore have been of opinion to set aside the verdict.

CROSS, J., *also dissenting*.

I see nothing to take this case out of the rule that there must be some external violence or corporal damage to the party; and therefore where a person either by working upon

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the fancy of another or by harsh and unkind usage as puts him into such a passion of grief or fear that he dies suddenly or contracts some disease which causes his death, the killing is not such as the law can notice.

If a man however does an act, the probable consequence of which may be and eventually is death, such killing may be murder, although no stroke be struck by himself and no killing may have been previously intended, as where a person carried his sick father against his will in a severe season from one town to another by reason whereof he died, 1 Russell, p. 650.

The law takes no cognisance of homicide unless death result from bodily injury occasioned by some act or unlawful omission or contradistinguished from death occasioned by any influence on the mind or by any disease arising from such influence, 1 Taschereau, 163, Clark, 245.

Bishop vol. 2, s. 637. When a man's will contributes to impel a physical force, whether such force proceed directly from another or from another and himself, he is to be held responsible for the result, the same as if his own unaided hand had produced it.

He explains at s. 641, that it is immaterial by what sort of force death is produced, always implying that there must be force. It may however be by poison administered or by neglect of duty towards a dependent person, but in no case do we find that mental terror, however inspired, whether by threats of violence or otherwise, has ever been held sufficient to hold the author thereof responsible for murder or manslaughter when death ensues.

A plausible theory has been suggested that where there has been an assault, and where the jury find that the fright occasioned by such assault is the immediate cause of death, such evidence would support a verdict of manslaughter or murder according to the circumstances of the case, and that an assault having been proved in this case as reported by the Hon. the presiding Judge, it was competent for the jury under his direction to find a verdict of manslaughter. Such theory may be rational and might perhaps be found consistent with principle, if once adopted, but I do not find such rule laid down in any book

of authority nor that any decided case has ever gone so far as this, and I am unwilling to acknowledge as a crime in law, what has never hitherto been admitted as such. I think it is not the mission of the courts to create new crimes but only to admit and deal with those already established. Besides, according to my view of the case, the great amount of the fear inspired in the deceased was not occasioned by the assault in question; the deceased had the certainty of protection from this by the numerous bystanders he had called to his assistance, seven of his neighbours being present; his dread was more the consequence of the previous disturbance and the attack of Cyrille Dugal on his brother Joseph which had caused the father, Ignace Dugal, to appeal to, and to call in the assistance of his neighbors. I infer this from the case submitted by the Hon. the presiding Judge. Having myself been present at the trial I had the same impression at the time. To support a verdict of manslaughter on the theory suggested I think it would have been necessary for the Judge to submit the question to the jury as to whether the assault in question inspired the fear which caused the death of Ignace Dugal; in other words whether the assault was the direct cause of his death; which was not done. The jury in my estimation based their verdict principally on the intimidation resulting from the conduct of Cyrille Dugal, prior to, and independently of the assault on the father; and upon the general terror which the father entertained of the son Cyrille on the occasion. The physicians give as the cause of the syncope the father's fear that the son would assassinate him, not the dread inspired by the assault, and where the two elements were combined it cannot be said that the verdict was based on the assault or its consequences. I have read the different cases cited by the counsel on both sides, and do not find that any of them go far enough to support the theory based on the assault. In *Reg. v. Murton* both elements were present, that is blows as well as mental anguish from harsh treatment, and there the distinction was clearly made, and a verdict of manslaughter rendered on the evidence that the blows given by the prisoner to his wife accelerated her death.

Mr. Justice BYLES in his charge to the jury remarked. "It will be for you to say whether you have any doubt that though like most persons she had the seeds of dissolution, her life might

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not as the medical witness stated it might have been, indefinitely prolonged, had it not been for the violence she received. The evidence is that blows were struck, but it is not suggested that these blows directly caused the death of the deceased. The case for the prosecution is that the whole violence together caused or hastened the death, the evidence of the witnesses is strong that the prisoner dragged the deceased off her seat and threw her on the brick floor." Further on he says: "Within a few hours of her death the woman said that her husband had caused her death, but to some of the witnesses she said that he had broken her heart, and that being turned out of her house had caused her death. Taken altogether these dying declarations are perhaps more in favor, than against the prisoner for if the woman died of a broken heart, and from anguish at being turned out of her home, it would not be a case of manslaughter. To constitute that crime there must have been some physical or corporal injury, negative or positive, as a blow or the deprivation of necessities or the like."

And at the conclusion he remarked: "the question then for you lies in a very narrow compass indeed. The question is, was the violence used to the deceased on the kitchen floor on that night the cause of her death? That is, did it cause her to die sooner than she otherwise would have done? If so you should find the prisoner guilty; if not acquit him."

It seems to me that this case puts the law in a clear light, and when applied to that of Dugal shews that the evidence against him is not of a nature to support a conviction.

In the *Queen v. Pitts*, Carrington & Marshall R. p. 284, there was violence, the deceased was driven into the water, whether by threats or force was immaterial, he was coerced to a violent death by drowning. Justice ERSKINE in summing up said: "A man may throw himself into a river under such circumstances as render it not a voluntary act, by reason of force applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step."

In the *Queen v. Towers*, 12 Cox p. 580, it was held by Mr. Justice DENMAN that violence to a nurse was violence to an infant in her arms, that the two could not be separated. This ruling does not affect the present case.

The case of Captain Freeman cited from Wharton's law of homicide, p. 118, belongs to another class altogether and is not applicable. It is unnecessary to refer to the other cases nor to the additional authorities cited in support of the general principle contended for on the part of the prisoner Dugal.

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It is an admitted fact that persons have died of excess of joy as well as of fear or anguish. If in construing the law we allow ourselves to drift into the uncertain sea of metaphysics I fear that a correct appreciation of cases to be governed thereby would be found beyond the reach of correct human appreciation from which uncertainty and error would be the probable result. I fear that the precedent to be established by supporting the verdict against Cyrille Dugal may be pernicious and I am therefore of opinion that it should be set aside.

RAMSAY, J., *rendering judgment.*

The prisoner was indicted at the October term of this Court Crown side, for manslaughter.

It appears from the evidence that the prisoner had a quarrel with his brother, that the deceased, prisoner's father, took the part of the brother and that the prisoner having been stopped from fighting with his brother, threatened his father and advanced to within two or three feet of where deceased stood in a menacing attitude and that he was only prevented from striking his father by the interposition of one of the witnesses. However he did not strike deceased, who was removed in a great state of agitation and weakness from the house, and within twenty minutes after this he died of syncope. There is also some evidence, though not of a very satisfactory kind, that these acts of the prisoner, which the doctor who was examined styles "*des menaces*," were of a nature to produce the death of the deceased by syncope.

When the Crown case was closed, the prisoner's counsel asked that the case might be stopped as there was only evidence of terror, and the learned judge who tried the case, without, so far as we know, controverting this proposition, promised to reserve the case, if there was a conviction, and he left the whole case to the jury. Especially under these circumstances it would have been perhaps advantageous for us to know whether the learned judge specially charged the jury as to what kind of vio-

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lence was necessary to constitute felonious homicide, and whether he told them that mere verbal menaces were not sufficient, but he has not thought proper to reserve any question as to the charge for our consideration, and we are strictly confined to the reserved case. Nor can we infer anything from the absence of information as to the charge. The judge is not obliged to charge the jury, and the extent of the instructions he gives them is a matter for his discretion. We might perhaps set aside the verdict if the judge made a bad charge in law and it was submitted to us, but we cannot presume that the charge was bad.

It seems to me then that the whole question before us is as to whether there was an assault or not. If the evidence discloses an assault, real or constructive, and the jury have found that the death was the result of it, the verdict cannot be touched. It does not seem to me to be of any importance to enquire whether the assault created such a terror as to induce the deceased to do some act by which he lost his life, or that it produced on him such a convulsion as to produce a disease which immediately caused his death. That the proper test is, assault or not, appears to me not only to be based on principle, but to be supported by authority. It is perhaps true that neither in the cases we have seen nor in the text writers, is the principle I invoke, set forth in so many words; but, I think, it is the principle which we can alone evolve from the jurisprudence.

And firstly, I consider there can be no question, that neither murder nor manslaughter can be committed without an assault real or constructive. On the other hand if a man die from the effects of an assault, it must be manslaughter or murder according to the circumstances. It is a novelty to me that the death must be the result of a battery. The authors say that it must be the result of physical violence, but an assault has never been classed as a moral violence.

Secondly. If we examine the cases we find that one may commit manslaughter or murder without touching the deceased, as when one unlawfully administers poison or some deleterious drug which causes death. Or, when one creates such terror as induces the deceased to do something he would not otherwise do from terror, and death has been the result, as in the case of *Reg. v. Hickman*, 5 C. & P., p. 151; and *Reg. v. Pitts*, C. & M., p. 284. The case of *Reg. v. Towers*, (12 Cox 528), has also been refer-

red to, but it appears to me to be a case of so exceptional a character as to render it very difficult to draw any general principle from it. There the act of violence was not directed against the deceased, a child of tender years, but against the child's nurse, who had the child in her arms, and Mr. Justice DENMAN intimated that the death of a grown person from fright alone could not be considered manslaughter. He seems to have thought that the reason of this was that it could not be believed that fright alone would cause the death of a grown up person.

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In the case before us, I think the assault was fully made out. Robin says distinctly that the prisoner would have struck his father if he had not been prevented, and that when he was stopped he was close to him. It was therefore the duty of the judge to leave the whole case to the jury, as was done in the case of *Reg. v. Murton*, 3 F. & F., p. 492. On these grounds I would therefore sustain the verdict.

I may however without impropriety refer to a difference of opinion expressed by the learned Chief Justice, and for which I was not prepared. He says that assault is not a necessary ingredient of murder or manslaughter. If by this he means that the assault may be constructive, I agree with him; but that an assault is a necessary ingredient of manslaughter is too elementary to be questioned. As a test of this we all know that under our statute a man accused of manslaughter or murder, may be found guilty of assault, without any count for the assault. And why? Simply because an indictment for manslaughter or for murder includes an assault.

Again, I quite agree with Mr. Justice CROSS that there must be a corporal injury. But syncope is just as much a corporal injury as drowning. There is nothing "metaphysical," about a syncope. He says further that if we admit fear as being a sufficient cause of death to constitute manslaughter, we must also consider joy. But joy cannot be the emotion created by an assault.

Mr. Justice TESSIER appears to have done precisely what was done in *Murton's* case. The only difference is that we know what Mr. Justice BYLES charged the jury, and we have not Mr. Justice TESSIER's charge. That is, the charge was not submitted to us, and consequently we have no jurisdiction with regard to it.

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TESSIER, J., *concurring*.

La matière en débat qui est soumise à ce tribunal peut se résumer en deux questions.

La première consiste à savoir, si d'après la preuve, dont le texte nous est rapporté dans cette cause réservée il y a eu un assaut de la part du prisonnier Cyrille Dugal sur Ignace Dugal son père. Pour me garder contre toute erreur sur ce point, il me paraît convenable, au moins pour ma propre satisfaction, de rappeler ce que la loi définit et considère comme un assaut.

Archbold, édition de 1875, pages 692, 693. "An assault is an attempt to commit a forcible crime against the person of another ; such as an attempt to commit a battery, murder, &c..... Pointing a pitchfork at a man, when within reach of it ; or any other like act indicating *an intention to use violence* against the person of another is an assault..... So if *A.* advance in a threatening attitude towards *B* to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault."

Or la preuve en la présente cause a établi que le prisonnier dans cette malheureuse circonstance "a pris un couteau dans un tiroir, on le lui a ôté. Le prisonnier a dit à son père "mon vieux Christ, c'est aujourd'hui le bout." Le prisonnier était excité, il a parti pour fesser (sic) son père avec les mains levées Il ne restait pas alors plus que 2 à 3 pieds de distance entre le père et le fils. Le prisonnier aurait frappé son père, s'il n'en eut pas été empêché."

Voilà bien un assaut prouvé en loi, quoiqu'il n'y ait pas eu *batterie*.

La seconde question est de savoir s'il est en preuve que les faits ci-dessus ont causé la mort du père Ignace Dugal. Ici se présente l'objection faite par l'avocat du prisonnier, c'est que vu qu'il n'y a pas eu de coup infligé à la victime (bodily harm), la frayeur seule qui a pu causer la mort ne constitue pas un homicide criminel (manslaughter).

Il est vrai que les précédents semblables à celui-ci sont assez rares, et plusieurs auteurs de droit criminel disent que la mort

causée par la frayeur exercée sur l'esprit d'une personne "*by any influence on the mind or by any disease arising from such influence,*" n'est pas un crime reconnu par nos lois. Mais en supposant cette doctrine vraie, n'y a-t-il pas une distinction à faire, avant de l'appliquer au cas actuel ?

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Si quelqu'un communique à un autre qu'il a l'intention de le tuer, soit par lettre ou par simple conversation, sans menace d'aucune violence actuelle, la personne à qui cela est adressé a le temps d'y réfléchir, elle a les moyens à prendre pour échapper à la mort, mais si elle entretient cette frayeur volontairement jusqu'à en mourir, il n'y a pas d'homicide criminel en ce cas. La cause actuelle est différente, il y a preuve d'un assaut, de menaces de violence, la victime M. Ignace Dugal n'a pas le temps de réfléchir, il est saisi d'une frayeur corporelle, si je puis m'exprimer ainsi, il n'a pas le temps de réfléchir, et suivant l'expression du témoin Robin, dans la chambre même sur le coup "le père s'est affaibli, il a descendu à peine l'escalier avec son aide, il a été amené à la maison voisine, il a à peine parlé et environ vingt minutes après les menaces du prisonnier à son père, celui-ci était mort."

Ce n'est pas une simple frayeur qui s'est produite sur l'esprit, mais c'est une frayeur accompagnée de violence qui a eu son effet immédiat sur les nerfs, qui a, suivant le témoignage du Dr. Lemieux, fait refluer le sang au cœur, a arrêté la circulation et la respiration, a produit la syncope et la mort.

Ce n'est pas une simple opération de frayeur sur l'esprit, parce qu'en cette circonstance la victime n'a pas eu le temps de penser beaucoup ; l'effet s'est produit immédiatement sur ses forces corporelles, qui n'ont pas été suffisantes pour résister à cet appareil de violence d'un fils contre son père. Quelle différence y aurait-il eu sur le résultat, si le fils eut simplement touché de la main son père ? Cependant en ce cas, il semble qu'il n'y aurait aucun doute sur la commission du crime d'homicide.

Le cas tel qu'il est réservé n'indique pas de quelle manière le juge qui a présidé au procès s'est adressé au jury, mais la présomption que ce tribunal doit tirer de ce qu'il n'y a eu aucune objection quelconque à l'adresse du juge, c'est que les faits ont été soumis tel que prouvés à l'appréciation du jury. Quoi qu'il ne

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soit pas nécessaire ou peut être convenable de le dire, comme c'est moi qui ai pris le procès, je me rappelle bien que j'ai soumis au jury, que s'ils avaient foi dans les témoins, l'assaut du prisonnier sur son père était prouvé suivant la loi et que si d'après les faits prouvés contre le prisonnier ils croyaient que ces faits avaient causé la mort du prisonnier, ils pouvaient le trouver coupable de (manslaughter) homicide criminel. On a dit en faveur du prisonnier, qu'il eut dû être fait une réserve à l'effet de rejeter les paroles qui ont été prononcées par le prisonnier, mais il faut remarquer que ces paroles menaçantes servaient à confirmer la preuve du crime d'assaut ; les paroles seules ne forment pas un assaut, mais les gesticulations menaçantes d'une personne vis-à-vis d'une autre, accompagnées de paroles qui montrent l'intention d'assaillir et de frapper cette autre personne constituent l'assaut. Ceci n'est-il pas conforme à la définition précitée de l'assaut : " or any other act indicating *an intention to* " use violence against the person of another, is an assault."

Si l'on se rejette dans le domaine de la théorie, il me semble qu'il est difficile de conclure qu'il n'y a pas eu en ce cas-ci crime d'homicide ; la frayeur chez la victime accompagne toujours plus ou moins la mort et sert à l'accélérer, lorsque cette mort est le résultat même d'une blessure corporelle. Celui qui a une grande force morale peut quelquefois triompher d'une blessure, tandis que l'homme d'une grande faiblesse morale succombera à une blessure semblable. Dira-t-on que dans le premier cas la preuve de la frayeur qui a pu contribuer avec la blessure corporelle à mort doit être rejetée, comme un élément illégal de preuve ? Je ne le crois pas.

La loi générale qui régit l'homicide n'a pas exclu un cas semblable à celui-ci ; sa définition n'est pas exclusive. Comme le dit Archbold, page 658, " murder may be poisoning, striking " starving, drowning and a *thousand other forms of death, by which* " human nature may be overcome, 4th Blackstone's Commen- " taries, p. 196. Hale I, p. 431.

" Taking away a man's life by perjury is not, it seems, in " law, murder ; although *in foro conscientie* it is as much so as " killing with a sword. If a man, however, do any other act, of " which the probable consequence may be and is eventually " death, such killing may be murder, although no stroke were

" struck by himself ; as was the case of the unnatural son who
 " exposed his sick father to the air against his will, by reason
 " whereof he died."

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Et à la page 658. " So, if one, under a well grounded *apprehension of personal violence*, do an act which causes his death, as
 " for instance, jumps out of a window or into a river, he who
 " *threatened* is answerable for the consequences. *Rex v. Evans*,
 " 1 Russell, p. 426, and *Rex v. Pitts*, Caryngton & M., 284."

En appliquant ces principes à la cause actuelle, il est difficile d'en venir à la conclusion que le crime dont le défendeur a été trouvé coupable par un jury de ses concitoyens n'est pas un crime pourvu par les lois d'Angleterre et par les nôtres, et qu'un fils peut causer par sa faute d'une manière aussi brutale et illégale la mort de son père et échapper à la peine du parricide. Je n'ai aucune hésitation à concourir dans l'opinion de la majorité des juges de cette cour et à confirmer le verdict rendu en cette cause.

Verdict sustained.

Frémont, for the prisoner.

Dunbar, Q. C., for the Crown.

COURT OF QUEEN'S BENCH,—APPEAL SIDE.

QUEBEC, 7TH DECEMBER, 1878.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

WATSON *et al.*, AND SAMSON, *in re* DINNING.

Held :—That a claim in insolvency (attested under oath and accompanied by vouchers), if contested, must be substantiated by legal evidence on the points raised, and if claimant requires further particulars of contestation than those stated he must demand them before evidence gone into. But a mere plea of general issue will not throw the *onus probandi* on the claimant.

RAMSAY, J.

The appellants were claimants on the estate of Henry Din-
 ning.

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Their claim was contested by the respondent and rejected. Appellants contend that their claim being attested under oath and accompanied by vouchers is proved to all intents and purposes, until the contestant disproves the claim. This does not appear to me to be the proper interpretation of sect. 104 of the Insolvent Act. It distinctly says that claims furnished to the assignee in a certain form "shall be considered as proved unless contested, *in which case the claims shall be established by legal evidence on the point raised.*" In other words the claimant must substantiate his claim in the usual way. Section 95 does not appear to me to modify this interpretation of the article. But appellant seemed to say that at all events there must be some detail that is wanting in this contestation. What the section 95 says, is that "the grounds of objection shall be distinctly stated." I think the contestation in this case does so; but at any rate if the appellant required more detail he should have applied for further particulars, and it is too late for him now, after the evidence has been gone into, to turn round and say that the contestation should be dismissed for want of a bill of particulars. There is however something in the objection that a contestation by way of general issue is not sufficient unless the object of the contestant be to deny the transaction altogether, and consequently a plea of mere general issue as a sort of reservation will not throw the burthen of proof on the claimant. The question therefore that remains is as to whether appellant has proved his claim by legal evidence on the points raised? And first I would observe that the contestation admits the debit side of the account, except the charges for commission, interest and disbursements. The *onus probandi* is therefore at once thrown on the respondent, who has undertaken to establish the off set on all the other points. He has to prove, 1st. That since the claim the ships have gained \$33,000 and upwards,—2nd. That since the attachments in this cause they have received \$6,000 and upwards,—3rd. That the transaction with the Lorenzo turned to the profit of appellants and was a cause of off set to the estate, and 4th. That the valuations of the ships were too low. I find no evidence to establish any of these four propositions. On the contrary the transaction with regard to the Lorenzo is satisfactorily shown to be totally outside of the claim. If appellants are to have that matter opened again it must be on some proceeding to set aside the transaction, so that they may have an opportunity of urging their original claim over the

Lorenzo. As for the other articles destined for the completion of the Lorenzo, they cannot affect the question. They either belong to the Messrs. Watson or they do not. If they do, respondent has nothing to say, and if they do not the estate will get the \$4,000 deposited as security.

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On the other hand the evidence is complete unless Mr. Dinning is not a competent witness. It is useless to say that his position affects his credibility unless he is contradicted, or unless it be shown that he has a fraudulent intention to charge his own estate for the purpose of injuring respondent. It is of course possible that the appellants may be in league to despoil the estate but we are not to presume this. I think then the judgment dismissing appellants claim is wrong and that the contestation should be rejected with costs in both courts.

The judgment of the court is as follows :

The Court of Our Lady the Queen, now here, having heard the Appellants and Respondent by their counsel respectively, examined as well the record and proceedings in the Court below, as the reasons of appeal filed by the said appellants and the answers thereto and mature deliberation on the whole being had :

Considering that the appellants have duly proved their claim, against the estate of Henry Dinning, to the amount of £36,273 13s. 8d. sterling, money of Great Britain, of which they claimed £10,000, as the amount of their unsecured claim.

And considering that the respondent has not proved the allegations of his contestation of the appellant's claim.

And considering that there is error in the judgment rendered by the Judge of the Superior Court, sitting in Insolvency, on the 12th of July 1878, dismissing the claim of the said Appellants.

The Court doth reverse and cancel the said judgment and proceeding, to render the judgment, which the judge of the said Superior Court, should have rendered, doth reject and dismiss the contestation, filed by the said respondent to the claim of the said appellants.

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And doth confirm the resolution of the twelfth of February, one thousand eight hundred and seventy-eight, appointing Owen Murphy, assignee to the estate of the said Henry Dinning.

And doth condemn the respondent to pay to the appellants, the costs, as well in the court below, as on the present appeal.

And it is ordered that the record be remitted to the Court below.

Judgment reversed.

Holt, Irvine & Pemberton, for Appellants.

C. B. Langlois, Q. C., for Respondent.

COURT OF QUEEN'S BENCH—APPEAL SIDE.

QUEBEC, 7TH DECEMBER, 1878.

Coram DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

MURPHY AND CONNOLLY *et al.*, *in re* DINNING.

Held:—1. A creditor who has proved his claim according to section 104 of the Insolvent Act of 1875, is entitled to vote for the appointment of an assignee, although his claim has been contested and the contestation is still pending.

2. A creditor who has specified the value of the securities which he holds, as required by section 84 is entitled to vote as a creditor for that portion of his claim which is in excess of the value of such securities.

3. A commissioner to receive affidavits to be used in the Supreme Court of Judicature in England, is an officer duly authorized to receive the oath of a creditor to a claim to be filed in Insolvency under sections 104 and 105 of the Insolvent Act 1875.

4. A creditor who has proved his claim as being unsecured, and who has not claimed any privilege, is entitled to vote for the appointment of assignee as an ordinary creditor, more particularly, if the claim does not appear on its face to be a privileged claim.

SIR A. A. DORION, C. J.—This appeal arises out of proceedings in Insolvency for the appointment of an assignee to the Insolvent estate of Henry Dinning.

At a meeting held in June 1877, the present Appellant was chosen assignee and Messrs. Holt and Webster were named inspectors, by a large majority of the creditors who represented claims considerably in excess of one half of the total amount of the claims proved.

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On a petition of some of the creditors the Court below after rejecting a great many of the claims of the creditors who had voted for or against the assignee and inspectors, cancelled the appointment of the Appellant, and declared that Richard Henry Wurtele, having obtained a majority of the votes of creditors representing a majority in value of the claims proved, was duly elected assignee and that as the majority in number, did not agree with the majority in value of all the claims proved, as to the appointment of the inspectors, the Court appointed C. G. Holt and John Burstall as inspectors, instead of Holt and Webster who had been appointed at the meeting of the creditors.

This judgment was reversed in appeal, and this Court ordered that a new meeting of creditors be held for the purpose of electing an assignee and inspectors.

This meeting took place on the 12th and was adjourned to the 16th of February 1878, when the Appellant was again chosen assignee and Messrs. Holt and Clint named Inspectors.

The respondents, creditors of the estate, presented another petition against the appointment of the appellant as assignee, and of the two inspectors, and the Court below after rejecting the votes of Watson Brothers, of Ducasse Claveau & Co., and of Adam Watters, cancelled the appointment of the Appellant as assignee and of Holt and Clint as inspectors, and appointed William Walker assignee, and condemned the appellant and Holt and Clint to pay the costs.

The grounds of the judgment are, that there were no vouchers nor particulars in support of the claim of Watson Brothers, for \$48,000; that it had been rejected by the Superior Court, that it was contested, and that they were secured creditors;—that the claim of Ducasse Claveau & Co., sworn by one of the parties, was not sworn before a judge of a Court of Record, in England, as required by the Insolvent Act of 1875, and that the

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affidavit of the attorney of the claimant does not state that he had a personal knowledge of the correctness of the claim, and that the claim of Adam Watters was a privileged claim ; that these claims amounting together to \$58,494.19, being deducted from the majority who had voted for the appointment of the appellant and of the Inspectors, there remained but twenty-seven creditors representing claims to the amount of \$25,459.37 who had voted for the appellant and for Holt and Clint as inspectors, and 19 creditors representing claims to the amount of \$28,601.96 who had voted for William Walker as assignee, and against Holt and Clint as Inspectors.

Looking at the claim of Watson Brothers, this Court finds that it is accompanied by very detailed bills of particulars, and that some fifteen hundred vouchers have been produced in support of it. At the argument it was not contended that there were not vouchers for every item of the claim, but merely that it had been impossible for the petitioners to verify the fact.

The claim has been regularly filed and proved in the form required by the statute. If the interested parties cannot point out in what respect it is deficient, it is not the duty of the Court the search through the mass of documents produced, to find out per chance some flaw, or some omission in the claim or in the vouchers produced. It is for the petitioners to point out in what respect the claim is bad, and failing to do so it must be held to have been duly made out and proved.

The answer to the objection that this claim has been rejected is, that, if reference is made to the judgment rendered on the first contestation of the appointment of an assignee, this judgment has been reversed by this Court and can no longer affect the claim. If on the contrary the reference applies to the judgment on the contestation of Watson Brothers' claim, which was rendered on the same day that the judgment was pronounced in this case, then we say that this judgment could not be made the basis of a petition presented many months before it was rendered, and that if this judgment could have such a retroactive effect, it would now cease to have any such effect, since it has this very day been reversed by this court.

That the claim of Watson Brothers had been contested, and

that the contestation was still pending when the meeting of the 12th of February and the adjourned meeting of the 16th took place is not denied ; but according to section two, subsection *h*, of the Insolvent Act, a creditor as regards " his right to vote at meetings " in insolvency is a person, copartnership or company, whose " unsecured claims to an amount of one hundred dollars and " upwards, have been proved in the manner provided by the " act."

The only effect of a contestation is to oblige the creditor to establish his claim by legal evidence (*section 104 of the Insolvent act*), and to suspend the payment of dividends on the contested claim until the contestation has been disposed of (*section 129*) ; but the mere filing of a contestation does not affect the status of a creditor, as regards his participation in the management of the estate. Once his claim has been duly proved, he acquires the right to vote at all meetings of creditors, subject to this restriction, that if by the result of the contestation, his claim is either reduced or dismissed, then his votes, if decisive upon matters on which they were given, might be disputed and rejected, and the proceedings had by means of such votes cancelled.

The suspension of a creditor's right to vote by a mere contestation of his claim would be fraught with great injustice. In the present case the contestation was filed on the 11th of February, the day preceeding the meeting of the creditors. There were no doubt reasonable grounds for the contestation, since it has been maintained by the court of original jurisdiction, but a creditor wishing to favour the appointment of a friendly assignee, or some particular course of action with reference to the management and winding up of the estate, might on the eve of a meeting of the creditors, disqualify the most interested of them, by a simple contestation of their claim. Far from such a contestation being held as a disqualification, it has been held in England that if a creditor having a clear right to prove his claim has been excluded from voting for the appointment of a trustee, by the rejection of the proof of his claim, the appointment will be vacated, and a new meeting ordered, if the proof be afterwards held valid by the Court. (*Ex parte Crowther*, 24 *L. T. N. S.*, 330) The last ground invoked for rejecting the claim of Watson Brothers is that their claim was secured. By a reference to the proceedings, it appears that Watson Brothers' claim was for a

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much larger amount, but the unsecured portion of their claim was sworn to at \$48,000. To the extent of this last sum they were entitled to vote and to exercise all the rights of ordinary creditors. (*Insolvent Act 1875, sections 9 and 106*).

The second rejected vote is that of Ducasse Claveau & Co. The ground of its rejection assigned by the judgment is, "that" "the claim sworn to by one of the parties is not sworn before a" "judge of a Court of Record, in England, as required by the" "Insolvent Act, and that the affidavit of the attorney for the" "claimants, does not make oath that he has a personal knowledge" "of the correctness of the said claim."

It appears from what is stated in the factums of both parties that this claim was sworn to before "a commissioner to administer oaths in the Supreme Court of Judicature, in England." These commissioners are appointed under the authority of the Supreme Court of Judicature Act, 36 and 37 Vict., c. 66, sections 82 and 84,) by the Lord Chancellor of England. Our own statute passed in the 26th Vict., c. 41, section 3 declares that all oaths or affidavits administered by a commissioner authorised by the Lord Chancellor, to administer oaths in chancery in England, shall be as valid as if administered before a commissioner authorised to receive affidavits. This last statute is referred to in art. 30 of the civil code as still in force. Then by sect. 105 of the Insolvent Act, 1875, any affidavit required in proceedings in insolvency may be made before any person authorized by any statute of the Dominion or of any province thereof, to take affidavits to be used in any Court of Justice in any part of the Dominion.

The Commissioner who swore the claimant was a commissioner appointed by the Lord Chancellor. The provincial statute 26 Vict., ch. 41 admits as valid in our courts, any oath or affidavit taken before a commissioner authorised by the Lord Chancellor, and the Insolvent Act allows affidavits in insolvency to be taken before any person authorized by any statute, by any of the provinces of the Dominion, to receive the same. The claim is complete and it is impossible to see what is wanting in the affidavit to the claim of Ducasse Claveau & Co. A difficulty arises however in this, that the claim is not in the record and we have not been able to verify if the jurat was exactly as represented by the

parties. It has been represented to us that the claim was lost. There is however no proof of this in the record. But supposing the absence of the claim in the record to be an insuperable difficulty, we consider that under all the circumstances of this case the claim sworn to by Mr. Partridge, as the agent of Ducasse Claveau & Co., ought to have been held sufficient, although he did not state to have a personal knowledge of the matters deposed to. The claim is based on a bill of Exchange annexed to the claim, and in addition to the affidavit of Mr. Partridge the Bill of Exchange is produced. This would be held sufficient evidence in any Court of Justice. Mr. Partridge might very well object to state on oath that he had a personal knowledge that the claimants held no security. This is what no agent residing two thousand miles from his principal, would undertake to swear to, and to reject a claim against which there is not the slightest suspicion raised, and which is otherwise proved would be declaring that no agent here could prove a claim of his principal residing abroad. This was not what was intended by the act.

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We are therefore disposed to say that the claim Ducasse Claveau & Co., was improperly rejected.

The third vote rejected was that of Adam Watters, because it was not supported by proper vouchers and was a privileged claim.

The sum claimed is for groceries as per pass book produced. This pass book is certainly a proper voucher, but if the goods had been delivered without a pass book and on a verbal order, what voucher could have been required in that case. It is evident that Watters produced the only voucher which it was possible for him to supply.

That Watter's claim is a privileged one does not appear by the claim itself. It is true that groceries furnished for the use of the family may in certain cases constitute a privileged debt; but nothing in this claim shows that the groceries sold by Watters were for the use of, or consumed in the family of the debtor, and moreover the amount is not claimed as a privileged debt, and were it a privileged claim, the claimant would have waived his privilege by claiming as an ordinary creditor, without making any reserve, (*Re Hoare. Law Rep. 18 Equity 705.*)

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These three claims amounting together to \$53,494.18 being restored, there are thirty creditors representing \$78,953.86 who voted for the appellant, and only nineteen creditors representing \$28,601.39 who voted for Walker. There was therefore no case for the decision of the judge, as between Murphy and Walker under sect. 102 of the Insolvent Act, since Murphy had received the votes of a majority of the creditors, who had proved their claim and who represented the largest aggregate amount of claims. The judge could only have interfered in case the majorities in number and in value had disagreed.

It has been urged that under section 37 the judge had a right on the complaint of any one or more of the creditors to rescind any resolution passed at a meeting of the creditors. This section has not been made for the purpose of giving the court or judge a right to control the will of a majority of the creditors in the choice of an assignee. The whole policy of the Insolvent Act is to give to the creditors the control and management of the estates of their Insolvent debtors and for that purpose they are by special provisions authorized to appoint assignees of their own choice. The only case in which it is provided that a judge may interfere in the election of an assignee is when no choice has been made owing to a disagreement between the majority in number and the majority in value of the claims proved.

There is nothing in the grounds urged against the appellant to disqualify him to act as assignee to this case or to lead the court to suppose that he will not act in the interest of the estate. If in the discharge of his duties he failed to act properly or justly towards any one or any class of creditors, then the authority of the Court or of a judge might be invoked, under sect. 37, to restrain the improper action of either a majority of the creditors or of the assignee himself.

These views being shared by all the members of the Court the judgment of the Court below must be reversed and the resolution of the creditors appointing the appellant assignee to the estate of the Insolvent Henry Dinning must be confirmed. There is a difficulty about the inspectors Holt and Clint. Their appointment was cancelled by the Court below and they were condemned with the appellant to pay the costs of proceedings of which they were not notified—they never having been made par-

ties to the case. Yet as they have not appealed, we do not think we can relieve them from a judgment which under the circumstances can have but very little effect, if it has any at all, and we do not by this judgment deal with their case. They will either act as inspectors under the appointment already made, or the creditors may at a subsequent meeting appoint them *de novo* or appoint others in their stead, as they may deem proper.

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RAMSAY, J.—I entirely concur with the Chief Justice's remarks, to which I have only one observation to add. Respondents content themselves with saying generally that the claim is not sustained by vouchers. There is however a packet containing 1473 vouchers and I think the appellants should have been in a position to indicate to the Court in what particulars they were insufficient. It will be observed that the vouchers are not essential, like the affidavit in support of the claim. They may be dispensed with, and some other evidence to the satisfaction of the assignee substituted.

Judgment reversed.

William Cook, for Appellant.

C. B. Langlois, Q. C., for Respondent.

COUR SUPÉRIEURE, QUEBEC.

19 MARS, 1878.

No. 1057.

Coram CARON, J.

LA BANQUE DES MARCHANDS DU CANADA v. SAMSON,

FAILLITE—BILLET PROMISSOIRE—DÉCHARGE.

JURÉ :—1° Que dans le cas d'un billet promissoire, la créance du porteur est suffisamment indiquée dans l'état fourni au syndic par le failli, si telle créance est au nom d'un tiers, endosseur du dit billet :

2° Que, dans ce cas, le porteur qui n'a pas reçu d'avis ni produit de réclamation, est représenté, pour toutes les fins de l'acte de faillite, par l'endos-

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seur dont le nom est ainsi porté en son lieu et place comme créancier du failli, et que la signature du dit endosseur à l'acte de composition et décharge lie le porteur à toutes fins que de droit ;

3^e Que le créancier d'un failli ne peut être reçu à invoquer la nullité à son égard de l'acte de composition et décharge, s'il a connu la faillite de son débiteur assez tôt pour s'opposer en temps utile à la confirmation par la Cour du dit acte ;

La demanderesse poursuit le défendeur (27 novembre 1876) pour le recouvrement de diverses sommes, comme suit, savoir :

1. \$1062.78 étant le montant d'un billet promissoire signé par le défendeur à l'ordre de Côté, Gougeon & Cie., et par eux transporté à la Demanderesse, et le coût du protêt.

2. \$1104.22, étant le montant d'un billet promissoire signé par le défendeur à l'ordre de Côté, Gougeon & Cie., et par eux transporté à la demanderesse, et le coût du protêt.

3. \$849.57, étant le montant d'un billet promissoire signé par Charles E. Seymour, à l'ordre du défendeur, transporté par lui à Côté, Gougeon & Cie., et par eux à la demanderesse.

4. Enfin, \$344.56, pour montant d'un billet promissoire signé par le dit Seymour à l'ordre du défendeur, endossé par lui à Côté, Gougeon & Cie., et par eux à la Demanderesse—avec le coût du protêt du dit billet.

Le défendeur plaide à cette action :

Qu'il a fait une cession de biens en vertu de l'acte de faillite 1875 à R. H. Wurtele, le 31 août 1875.

Que le 28 août, même année, il a obtenu du nombre requis de ses créanciers, représentant la proportion exigée par la loi, un acte de composition et décharge moyennant 25 centins dans la piastre.

Que cet acte a été ratifié par la Cour le 8 novembre 1876. Que les billets mentionnés en l'action faisaient partie du passif du défendeur lors de sa faillite, que celui-ci a offert à l'échéance des termes stipulés dans l'acte de composition, le paiement de la dite composition, ce que la demanderesse a refusé.

Qu'il est dû à la demanderesse la somme de \$840.11 sur la

dite composition, et qu'il confesse jugement pour cette somme ;
concluant au renvoi de l'action pour le surplus.

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La demanderesse répond spécialement :

Que le défendeur ne s'est pas conformé à la loi pour obtenir son acte de composition et décharge.

Qu'il n'a jamais mentionné la demanderesse sur la liste de ses créanciers, ni donné aucune particularité des billets dont elle était porteur, suivant la clause 61 de l'acte de faillite.

Que la demanderesse n'a reçu aucun des avis auxquels les créanciers ont droit par la loi, qu'elle n'a pu produire et n'a pas produit de réclamations en temps utile, et que l'acte de composition et décharge obtenu par le défendeur ne peut affecter la créance de la demanderesse.

Il appert par la preuve que le nom de la Demanderesse n'apparaît sur aucune des listes fournies par le défendeur de ses créanciers, que la demanderesse n'a reçu aucun avis de la cession, ni d'aucune des assemblées des créanciers, que la demanderesse a produit une réclamation le 24 janvier 1876, c'est-à-dire deux mois après la rétrocession par le syndic au défendeur, que les quatre billets promissoires sur lesquels est basée l'action sont inclus et compris dans les sommes pour lesquelles Côté, Gougeon & Cie. sont portés créanciers sur la liste fournie par le défendeur au syndic de ses créanciers, et que Côté, Gougeon & Cie., ont signé l'acte de composition

La demanderesse admet qu'elle a refusé les paiements offerts en à compte sur l'acte de composition, vu qu'elle prétendait être payée intégralement.

Les avocats de la demanderesse soulevèrent au mérite une autre objection tirée de l'acte de composition lui-même. A cet acte comparurent un certain nombre de créanciers nommément, d'une part, et le défendeur d'autre part, lequel se reconnut endetté aux diverses personnes et sociétés commerciales *sus-nommées*, et s'engagea *leur* payer la somme de 25 centins dans la piastre qu'ils acceptèrent en parfait paiement, avec hypothèque sur ses propriétés comme garantie du paiement. La demanderesse a prétendu que cet acte n'avait aucune valeur parce qu'il ne pour-

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Elle cita, à l'appui de cette dernière prétention :

Burdot v. Miles, 6 Best & Smith, page 985.

Shaw v. Massie, 21 U. C. C. Pleas, page 269.

King v. Smith, 19 U. C. C. Pleas page 319, 324.

Chesterfield Colliery Co. v. Hawkins, 3 Hurt & Colt R. page 676.

Benham v. Broadhurst, 19 U. C. C. P. page 472.

Palmer v. Baker, 22 U. C. C. P. page 59.

Allan v. Garrett, 30 U. C. C. P. page 168.

Acte de faillite de 1875, section 49.

Côté, Gougeon & Cie., n'étaient à aucun titre aux droits de la demanderesse ; leur signature à l'acte de la composition ne pouvait la lier, pas plus qu'elle ne pouvait bénéficier des obligations contractées par le défendeur envers eux, et des garanties qu'il leur avait données. Autant voudrait dire qu'une partie obligée au paiement d'un billet promissoire pourra appeler à sa faillite toute autre partie au dit billet, et se faire donner une décharge qui liera le porteur, seul et véritable créancier ; en d'autres termes, qu'un débiteur en faillite pourra obtenir sa décharge en dehors de toute participation de ses créanciers, en laissant de côté les porteurs des billets non payés qui composent sont passif

Les considérants de l'Hon. juge que nous reproduisons intégralement, feront connaître les raisons invoquées par le défendeur et celles donnés à l'appui du jugement.

Considérant que la demanderesse réclame \$3,360.47, montant de quatre billets promissoires et du coût de protêt d'iceux, dont deux des billets sont signés par le défendeur et les deux autres endossés par lui ;

Considérant que le défendeur plaide à cette action qu'il a obtenu, depuis la signature et l'endossement de ces billets, un acte de composition et décharge de ses créanciers daté du 28ème jour d'avril 1875, lequel a été confirmé par un jugement de cette cour le 8ème jour de novembre mil huit cent soixante-et-seize, et que les dits billets avaient été indiqués par le défendeur par ses listes et état fournis au syndic nommé à sa faillite ;

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Considérant que la demanderesse allègue dans sa réponse spéciale que la créance de la demanderesse n'est pas annexée au dit acte de composition, et que cet acte n'est pas signé par ses créanciers en nombre et en valeur ainsi que requis, ni par la demanderesse ;

Considérant qu'il est en preuve au dossier que les créances réclamées par la demanderesse, lesquelles consistent dans les quatre billets promissoires sus-mentionnées, tous endossés par Côté, Gougeon & Cie., étaient comprises dans les sommes de \$1781.67 et de \$6,987.46, que la société Côté, Gougeon & Cie., a déclaré lui être dues par le défendeur, lors du dit acte de composition, ainsi qu'il paraît par les listes et états des créances du défendeur et par lui fournis au syndic de sa faillite ;

Considérant que les dits Côté, Gougeon & Cie. ont signé le dit acte de composition et que, vu qu'ils se sont alors déclarés les créanciers des montants des dits billets promissoires, le défendeur n'avait aucune raison de croire que la demanderesse en était porteur ;

Considérant que malgré l'absence de la demanderesse à la première assemblée de ses créanciers, le défendeur a obtenu le consentement pour son dit acte de composition et décharge du nombre requis de ses créanciers, et comme représentant la valeur exigée par la loi de toutes réclamations légales qui existaient contre lui ;

Considérant qu'il est pourvu par le dit acte de composition au paiement des dits billets promissoires, vu que les dits Côté, Gougeon & Cie. qui l'ont signé se sont déclarés créanciers au défendeur pour le montant de ces billets ;

Considérant que la demanderesse ayant produit sa réclamation le 24 janvier 1876 contre le défendeur, entre les mains du

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syndic à sa faillite, Richard Wurtele, n'a plus le droit d'invoquer la nullité à son égard du dit acte de composition et décharge, parce qu'elle n'a pas reçu d'avis de l'assemblée des créanciers du défendeur qui l'a précédée, et aussi parce que son nom ne se trouve pas dans la liste des créanciers mentionnés en cet acte et donné au dit syndic ;

Considérant que le défendeur n'ayant obtenu sa décharge que le 8ème jour de novembre 1876, c'est-à-dire plus de neuf mois après la production sus-mentionnée de la réclamation de la demanderesse, cette dernière a eu tout le temps convenable de s'opposer à la dite demande de confirmation de l'acte de composition en question ;

Considérant qu'avant même la confirmation de cet acte par la Cour, le défendeur a offert un versement dû en vertu d'icelui, ce qu'elle a refusé, en alléguant qu'elle prétendait avoir tout le montant de sa créance ;

Considérant qu'aucune preuve de fraude n'a été faite contre le défendeur dans toutes ses procédures pour obtenir la confirmation de son acte de composition ;

Considérant que la créance de la demanderesse a été suffisamment indiquée dans la liste ou état fournie au syndic par le défendeur, puisqu'il est prouvé qu'elle était au nom de Côté, Gougeon & Cie., endosseurs des dits billets ;

Considérant que le défendeur a confessé jugement pour \$840 11 intérêts et dépens ;

Considérant que la demanderesse n'a pas prouvé les allégations essentielles de sa déclaration et de sa réponse spéciale, et que les moyens invoquées par le défendeur sont fondés et prouvés ;

Maintient l'exception péremptoire en droit du défendeur et condamne le défendeur à payer à la demanderesse la somme de \$840.11 avec intérêt de l'échéance de chaque terme, le tout selon la confession de jugement, et renvoie la réponse spéciale et l'action de la demanderesse quant au surplus, avec les dépens encourus depuis la production de la dite confession de jugement.

Belleau, Darveau & Stafford, pour la demanderesse.

J. Malouin, C. R. pour le défendeur.

COUR DU BANC DE LA REINE—EN APPEL.

SEPTEMBRE 1878.

Coram DORION, J. C., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

FRASER v. GAGNON.

ACTION PÉTITOIRE—ACTION EN BORNAGE.

Jurat :—Qu'un propriétaire ne peut porter l'action pétitoire contre son voisin avant d'avoir mis ce dernier en demeure de contester ses droits de propriété. Autrement, comme il s'agit d'une question de limites, c'est l'action en bornage qui doit être portée.

SIR A. A. DORION, J. C.—L'appelant a acheté de Cléophas Dionne qui l'avait acheté à une vente faite par le shérif, un terrain vacant situé entre deux lots de terre qui appartiennent à l'Intimé.

L'Intimé ne conteste pas le droit de l'appelant au terrain qu'il réclame, mais il répond à la demande de l'appelant que, vu qu'il n'y a pas de bornes pour indiquer les limites des lots des parties, l'appelant aurait dû se pourvoir par action en bornage et non par action pétitoire.

Si l'appelant eut mis l'Intimé en demeure, et que celui-ci eut contesté son droit de propriété, il aurait pu demander à être déclaré propriétaire du terrain qu'il réclame, et demander en même temps à ce que les lignes fussent fixées entre lui et l'Intimé. Mais le droit de propriété n'étant pas mis en question, il ne reste qu'une question de limites à régler, et c'est par une action en bornage que l'appelant aurait dû se pourvoir, et non par une action pétitoire, ainsi que cela a été jugé dans les causes de *The Harbour Commissioners v. Hall*, 5 L. C., Jurist 155 et *Robertson v. Stuart*, 13 L. C., Reports, 462.

L'action de l'appelant a été déboutée, et le jugement de la Cour Inférieure doit être confirmé.

SUPERIOR COURT, QUEBEC.

19TH OCTOBER, 1878.

No 538.

Coram CARON, J.

GOODSON v. LEVIS & KENNEBEC R. R. Co.

Held :—A witness who has failed to appear cannot be condemned to a fine on motion to that effect, served upon him, but only on service of a Rule upon him.

Semble, that the motion for a rule must also be served, except when made on the return day of the subpoena.

Irvine, Q. C., moved that a witness, be fined \$40, for non-attendance on a previous-day, when duly summoned by subpoena. The motion was served on the witness, giving him notice to appear and shew cause, why he should not be fined.

Bossé Q. C., appeared to shew cause. The witness could not be condemned, because a *rule* had not been served on him as required by article 249, C. C. P.

Per curiam.—I would have been disposed to grant a *rule*, upon a motion on the day of the return of the subpoena ; and would have required no service of such a motion, the subpoena having been duly served. But in this case the subpoena was returnable some days ago. This motion must be dismissed on the principle, that a third party is not bound to appear in a cause upon a simple motion, signed by one of the attorneys ; but to force him to appear before the court, there must be a rule, order, or some other judicial authority. I cannot fine a person, who is not legally before me, namely, by the Queen's Writ, or Rule of the Court. The subpoena with entry of default, is merely a proof of such default. *Sexton v. Boston, and Egan*, 5 L. C. J., 334. *Higgins v. Bell*, 17 L. C. J., 274. Also, 18 L. C. J., 283, 2 L. C. J., S. C. 1876. *Rodier v. McAvoy* ; *Roy v. Beaudry & Laperrière*, 6 L. C. J., 85. Also 781 C. C. P.

After consultation with the other judges, I find that they are of the same opinion.

Motion dismissed.

COUR DE CIRCUIT, QUÉBEC

27 NOVEMBRE 1878.

Coram CARON, J.

LEPAGE v. BILLY.

JUGÉ :—Que le tiers porteur de bonne foi d'un effet de commerce daté à Québec, mais réellement fait à Rimouski, ne peut assigner le prometteur de tel effet qu'à Rimouski.

Le défendeur Billy donne à un nommé Robert, à Rimouski, un chèque sur la Banque de Montreal pour \$20, daté à Québec. Robert vient à Québec, endosse ce chèque, et le remet au demandeur. Celui-ci va présenter son chèque, et sur refus de paiement, assigne le défendeur devant la Cour de Circuit, à Québec.

Le défendeur comparait et produit une exception déclinatoire dans laquelle il allègue, que la cause de l'action instituée contre lui a pris naissance à Rimouski ; que le chèque en question, bien que daté à Québec, a de fait été consenti et signé et remis par le tireur au preneur, Robert à Rimouski, et qu'en conséquence le tribunal n'a pas juridiction.

À l'enquête, le défendeur prouva ce plaidoyer sous la réserve de toute objection à la légalité de telle preuve.

Au mérite le demandeur dit :

1. La preuve faite par le défendeur pour établir que son chèque a été tiré à Rimouski est illégale en autant qu'elle contredit absolument les termes du C. C. art. 1234.

2. Il y a deux espèces de juridiction : *personnelle* et *réelle*. Le consentement des parties ne peut ajouter à la juridiction *réelle* du tribunal, mais rien n'empêche un individu de permettre à son créancier de le poursuivre devant un tribunal autre que celui de son domicile, v. g. devant la Cour de Circuit, siégeant à Québec, au lieu de la Cour de Circuit siégeant à Rimouski. Il n'y a dans cet arrangement rien d'illégal, et une pareille convention doit être respectée. Or c'est ce qu'a fait le défendeur. En signant un chèque daté *Québec*, il a implicitement, sinon directement

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consenti que le contrat dont il signait la preuve fut considéré comme fait à Québec, et en eut toutes les conséquences. Il a donc consenti à la juridiction de la Cour de Québec, et n'a pu, en prouvant que son chèque a réellement été signé à Rimouski, se soustraire aux conséquences de son consentement.

3. Le demandeur est le tiers porteur de bonne foi, pour valeur d'un effet de commerce. Entre ses mains, suivant les termes mêmes de l'art. 2,287 du C. C., ce titre est parfait, exempt de toutes obligations ou objections qui auraient pu être opposées lorsqu'il était entre les mains de l'endosseur. Et la prétention du défendeur contredit formellement ce texte, qui est la seule garantie du tiers porteur de bonne foi. Si, à l'encontre du Demandeur, le défendeur ne peut prouver qu'il n'a pas eu valeur, *a fortiori*, il ne saurait avoir le droit de plaider une circonstance bien moins importante, à savoir qu'il a contracté à Rimouski après avoir déclaré que c'était à Québec.

A cette argumentation le défendeur répondit en citant deux précédents à l'appui de sa prétention, savoir la cause de *Gault et al. v. Wright et al.*, 13 L. C. J., page 60, et celle de *Hudon v. Champagne*, 17 L. C. J., p. 45.

La Cour a maintenu le plaidoyer du défendeur, et débouté l'action, mais sans frais, attendu la bonne foi du Demandeur

Pelletier, Bédard, Rouleau & LeMoine, Proc. du Demandeur.

Montambault, Langelier & Langelier, Proc. du Défendeur

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OF THE

QUEBEC LAW REPORTS.

COMPILED BY
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Held : That the only effect of the failure to deposit the same within the specified time would be to prevent the Roll from being conclusive against persons deeming themselves injured by it, and they would have the right to set up against the claim for their proportion of the assessment, the grounds they might have urged upon the hearing of a complaint under said sec. 66. The said section being merely directory, the failure to deposit thereunder could not operate to prevent the Roll from coming into force as a whole or to render it an absolute nullity. (Corp. of Lévis v. The G. T. R. Co.) 108

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“ :— *Vide INSOLVENCY.*

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“ :—In a case of collision, the Registrar and Merchants having found that there was a total and not a partial loss for which the claim was made,

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Held: That the general allegation of damages resulting from Defendant's refusal to sign the Deed was sufficient to support the conclusion for damages, and such general allegation was not to be considered as restricted by the statement that Defendant's said refusal had prevented a favorable sale to another. (*Motz v. Paradis, S. C.*) 291

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The defendant having obtained the services of plaintiff as high constable in connection with an information for a misdemeanour, specially undertook to pay plaintiff's fees therefor "according to the government regulations now existing:" It appearing that the prisoner had been sent for trial.

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There is no conflict between the judgments in *Rogers v. Rogers* and *Sweetapple v. Gwilt*. The decision in *Saul and his Creditors* was to a considerable extent founded on Spanish law, and, as was held in *Rogers v. Rogers*, cannot be regarded as a precedent by which the Courts of Quebec may be guided. (*Astill et vir v. Hallée, S. C.*).....

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“ Whosoever, being intrusted, either solely or jointly with any other person, with any *power of attorney* for the sale or transfer of any property, fraudulently sells or trans-

fers, or otherwise converts the same or any part thereof to his own use or benefit, or to the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned."

Held : That the *Power of Attorney*, mentioned in section 78, of 32 and 33 Victoria, chapter 21, must be a *WRITTEN Power of Attorney*, and oral testimony of a verbal Power of Attorney will not bring the Defendant's act within the scope of that statute. (*Regina v. Chouinard, C. Q. B.*).....

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INJUNCTION :— *Vide* INSOLVENCY.

INSOLVENCY :— Dans le cas d'un billet promissoire, la créance du porteur est suffisamment indiquée dans l'état fourni au syndic par le failli, si telle créance est au nom d'un tiers, endosseur du dit billet ;

Dans ce cas, le porteur qui n'a pas reçu d'avis ni produit de réclamation, est représenté, pour toutes les fins de l'acte de faillite, par l'endosseur dont le nom est ainsi porté en son lieu et place comme créancier du failli, et la signature du dit endosseur à l'acte de composition et décharge lie le porteur à toutes fins que de droit ;

Le créancier d'un failli ne peut être reçu à invoquer la nullité à son égard de l'acte de composition et décharge, s'il a connu la faillite de son débiteur assez tôt pour s'opposer en temps utile à la confirmation par la Cour du dit acte. (*La Banque des Marchands v. Samson, C. S.*).....

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" :— A creditor who has proved his claim according to section 104 of the Insolvent Act of 1875, is entitled to vote for the appointment of an assignee, although his claim has been contested, and the contestation is still pending.

A creditor who has specified the value of the securities which he holds, as required by section 84, is entitled to vote as a creditor for that portion of his claim which is in excess of the value of such securities.

A commissioner to receive affidavits to be used in the Supreme Court of Judicature in England, is an officer duly authorized to receive the oath of a creditor to a claim to be filed in Insolvency under sections 104 and 105 of the Insolvent Act 1875.

A creditor who has proved his claim as being unsecured, and who has not claimed any privilege, is entitled to vote for the appointment of assignee as an ordinary

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creditor, more particularly, if the claim does not appear on its face to be a privileged claim. (Murphy & Connolly, C. Q. B.)..... 368

“ :—The circumstances of this case do not disclose fraud, concealment or collusion, or any attempt whatever by Plaintiff to obtain a preference over other creditors.

There is no principle of common law, statutory provision or rule of public policy sanctioned by jurisprudence, requiring that all creditors being parties to a deed of composition should, irrespective of the existence of good or bad faith, detriment, injustice or inducement, or otherwise, be in perfectly the same position, to the extent of invalidating security given to one or more creditors, because others had not received it. (Bank of Montreal v. Audette, S. C.) 254

“ :—*Vide RENT.*

“ :—*Vide CLAIM.*

“ :—Under section 36 of the Canadian Merchant Shipping Act, the remedies provided by section 65 of the Imperial Act, are extended to vessels building in Canada while in course of construction. (In re Dinning and Wurtele et al., S. C.)..... 37

The powers conferred upon the Court by the said section as so extended may be exercised by a judge at chambers, and he may grant an injunction prohibiting any transactions affecting the vessel, for any period within his jurisdiction. (Do.)..... 37

Under the circumstances of this case the judge would grant the injunction prayed for. (Do.)..... 37

The High Court of Admiralty has the same powers over a British ship as are conferred upon the High Court of Chancery by sections 62 to 65 of the Merchant Shipping Act 1854, but this jurisdiction has not been extended to Courts of Vice-Admiralty, and belongs in Canada exclusively to the highest Court of original jurisdiction (Do.) 37

Section 68 of the Insolvent Act requires, in order that a creditor may take proceedings in his own name, first a demand upon and refusal by the assignee to take the proceeding, and then the permission of a judge to do so; Held: That such conditions are to enable the creditor to secure for himself all the advantages derived from these proceedings; but by the common law any creditor may take, at his own risk, in the common interest of the cre-

ditors, all such proceedings as will tend to bring into the common fund anything which it is attempted to direct from it, and there is nothing in the insolvent law differing from the common law on this point. (Do.).....

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" —Where the delay for renewing registrations under the cadastre expired between the date of the debtor's insolvency and the sale of his lands by the assignee.

Held: That a bailleur de fonds claimant who had not renewed the registration of his hypothec, would nevertheless be collocated by preference to a mortgagee who enregistered under the cadastre, but whose hypothec was subsequent in point of time to that of the said bailleur de fonds claimant, as, at the date of the insolvency, the latter's delay to renew had not expired, and no renewal of registration could have affected the lands after they passed into the hands and possession of the assignee, and even had such a renewal been made, it would not appear by the registrar's certificate, which in matters of insolvency would only show registrations up to the date of the attachment or assignment and not (as under 669 C. C. P.) up to the day of sale. (Brunelle v. Laffleur et Beauchène, C. Q. B.).....

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" :—A claim in insolvency (attested under oath and accompanied by vouchers), if contested, must be substantiated by legal evidence on the points raised, and if claimant requires further particulars of contestation than those stated, he must demand them before evidence gone into. But a mere plea of general issue will not throw the *onus probandi* on the claimant. (Watson et al. and Samson, C. Q. B.)

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INSPECTORS :— *Vide CLAIM.*

INSPECTEURS DE CUIRS :—En vertu de la 37 Vict., ch. 45, section 87, nul autre que l'inspecteur des cuirs n'a droit d'apposer sur le cuir une estampe indiquant la mesure superficielle de chaque pièce, lorsque tel cuir est pour être mis en vente. (Delisle v. Fortin, C. B. R.).....

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INSURANCE :—The sale of a property for municipal taxes under the municipal code, followed, by the redemption of the property in accordance with the said code, is not such an alienation as would avoid a policy of insurance either under the conditions endorsed upon it, or under the provisions of article 2576 of the civil code. (Pâquet v. Citizens Insurance Co., S. C.)... ..

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INTERLOCUTORY JUDGMENT :— *Vide REVIEW.*

JUDGE :— *Vide* PROHIBITION.

JUDGMENT :— *Vide* INTERLOCUTORY JUDGMENT.

LÉGATAIRE PARTICULIER :— *Vide* RÉTENTION POUR IMPENSES.

LÉGISLATURES PROVINCIALES :—Les pouvoirs des Législatures des Provinces ne s'étendent pas aux rivières navigables, ni à leurs lits, mais seulement (quant à ce qui a rapport au domaine public), à l'adm.nistration et à la vente des terres publiques appartenant aux Provinces, et aux bois et forêts qui s'y trouvent. (Normand v. The St. Lawrence Steam Navigation Company, S. C.) 1

Le gouvernement de la province de Québec n'a pas le pouvoir d'émettre des Lettres-Patentes octroyant un lot de terre à eau profonde dans une rivière navigable. (Do.)... 1

Le Souverain, lui-même, ne peut pas, par un octroi, empêcher la libre navigation des rivières navigables, ni qu'on se serve des rivages de ces rivières pour les besoins de la navigation, ni y imposer des droits. (Do)..... 1

LETTRES PATENTES :— *Vide* LÉGISLATURES PROVINCIALES.

LIBEL :—The publisher of a newspaper at Montreal who mails there copies of his paper, containing libellous matter, to a number of individuals and to public reading rooms in Quebec, *Held* to publish that matter in Quebec. (Irvine v. Duvernay et al., S. C.) 85

" :—It is no defence to an action for libel to say that the defendant, a news-paper proprietor, must give his readers all the information he can on public matters, or that what was said of the plaintiff formed part of a general report of the proceedings at a nomination, or that scenes of violence took place at such nomination concerning which the public was desirous of being informed, or that the article had to be written in haste, or that the information obtained was from persons worthy of belief, or that the article was written with the sole object of giving information to the public, in the manner usually practised by newspapers generally, or, that the plaintiff had not demanded a rectification from the defendant. (Déry v. Fabre, S. C.) 286

LISTES ELECTORALES :—L'on ne peut, dans un appel de la décision d'un conseil, sur des plaintes au sujet de la liste des électeurs, ajouter au rôle par une preuve verbale, ni le compléter en prouvant l'existence des faits qu'il ne constate pas, et que la loi veut qu'il contienne. (Experte F. Côté). 98

Lorsqu'un conseil municipal prend sur lui de réviser les listes, sans qu'aucune plainte ait été produite, il n'y a pas d'appel de sa décision à un juge en chambre. (Do).... 98

LISTES ELECTORALES :—Le fait que le conseil aura décidé sur une plainte, (lors même que celle-ci n'aura pas été produite dans les délais fixés par la loi) suffit pour donner juridiction au juge sur l'appel de cette décision. (Do).....	98
“ :— <i>Vide</i> ASSESSMENT ROLLS.	

LOSS :—*Vide* COLLISION.

MAGISTRATES :—*Vide* MUNICIPALITIES.

MANSLAUGHTER :—Death resulting from fear caused by menaces of personal violence and assault, though without battery, is sufficient in law, to support an indictment for manslaughter. (<i>Regina v. Dugal, Q. B.</i>).....	350
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The prisoner was indicted for manslaughter. It appeared that he had a quarrel with his brother, that the deceased, prisoner's father, took the part of the brother, that the prisoner, having been stopped from fighting with his brother, advanced in a threatening attitude to within two or three feet of deceased, and with violent words and menaces, and a table knife in his hand, declared that he would have done with deceased. He was prevented by the bystanders from striking deceased, who was removed in a state of great agitation and weakness, and within twenty minutes afterwards died of syncope. On these facts the jury found a verdict of guilty. The Court of Appeals, on a case reserved, sustained the verdict. (Do.)

MARRIAGE :—*Vide* FOREIGN MARRIAGE.

MERCHANT SHIPPING ACT :—*Vide* INSOLVENCY.

MEUBLES :—*Vide* BAIL.

MUNICIPALITÉS :—*Vide* CHEMINS DE FER.

“ :—No law stamps are required to be put upon proceedings before magistrates in civil matters. (<i>Simard v. Corp. Montmorency, S. C.</i>).....	208
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A county municipality can collect a tax imposed by itself not on a municipality but on certain individuals in whose interest it had opened a road which was a county road, and within its exclusive jurisdiction. (Do.)

Taxes imposed by the county on local municipalities can be levied by such local municipalities only. Taxes ordered to be levied on taxable property belonging to persons interested or benefitted by any public work, are direct taxes by the county, to be levied by it only. (Do.)

The validity of procès-verbaux and acts of apportionment cannot be tried incidentally, and they are conclusive and binding until set aside by direct proceedings such as furnished and authorized by the municipal code. (Do.)

MUNICIPALITÉS :—As a general rule governing the remedy by prohibition, it must be resorted to between the commencement of the action complained of and final judgment; otherwise the want of jurisdiction must appear on the face of the proceedings in order to justify prohibition after judgment. If the rate payer have abstained from urging before the magistrate's court, his objection to the jurisdiction of the magistrate, or to the sufficiency of the municipal acts, such objections will not afterwards be listened to, if urged collaterally upon proceedings in prohibition. (*Simard v. Corp. Montmorency, S. C.*)..... 208

MUNICIPALITY : *Vide* CORPORATION.

NANTISSEMENT :—*Vide* BAIL.

NOVATION :—*Vide* ACTION PERSONNELLE.

OBLIGATION :—Action by Respondent to recover first instalment of \$3,000 on obligation to pay \$18,000, as being a claim against the North Shore Railway Company, of which Appellant was contractor. The respondent was to obtain a resolution from the directors of the company, acknowledging the debt. By his action he averred that the appellant had rendered it impossible for him to obtain this resolution, inasmuch as he abandoned his contract with the company, which had ceased to exist, the Provincial Government having assumed the line and made a new contract with appellant, by which the latter was to pay all the debts of the extinguished company. *Held*, [reversing the judgment of the Superior Court] that without proof of the debt, Respondent could not recover. (*McGreevy & Vanasse, Q. B.*)..... 55

PAIEMENT :—La demande de paiement faite de la part d'un créancier par l'entremise d'une personne inconnue au débiteur et non munie d'une procuration, n'est pas une mise en demeure, quand le débiteur ne nie pas devoir, mais refuse seulement de payer à cette personne. (*Gagnon v. Robitaille, C. C.*) 186

PARTNERS :—*Vide* CLAIM.

PASSAGE :—Where a passage way has been opened and used from time immemorial, no title of servitude is requisite to support an action *confessoria* for encroachment on the same. (*Théoret v. Ouimet, C. R.*) 250

PAYMENT :—*Vide* DEBT.

PENSIONS :—Les pensions accordées aux pilotes infirmes, en vertu de la 45 Geo. 3, Cap. 12, s. 11, et de la 12 Vic., Cap. 114, s. 61, sont insaisissables. (*Shaw v. Bourget, C. C.*)..... 181

PILOTS :— *Vide* PENSION.

POSSESSION :— *Vide* PRESCRIPTION.

POSSESSION WRIT OF :— *Vide* ADJUDICATAIRE.

POWER OF ATTORNEY :— *Vide* INDICTMENT.

“ :— *Vide* CLAIM.

PRELIMINARY INVESTIGATION :— *Vide* FEES.

PRESCRIPTION :—The possession of the defendant under the circumstances of the present case could not be deemed a public possession against the plaintiff, so as to support the defendant's plea of prescription.

Quære. Can an unregistered conveyance serve as the basis of a ten years' prescription against a duly registered hypothec ? (Ross v. Légaré, S. C.)..... 270

“ :— *Vide* HYPOTHÈQUE.

PRIVILÈGE :— *Vide* RETENTION POUR IMPENSES.

PROCÉDURE :—ADJUDICATAIRE :—An adjudicataire of immoveables having failed to pay the price, one Bertrand produced on opposition *afin de conserver* and moved for a *folle enchère*. Bertrand's claim did not appear in the Registrar's certificate, and he had given notice of his motion *before filing* his opposition. *Held*, that as his claim was not proved in the Record at the time he gave notice, his motion must be rejected with costs. (Fraser v. Garant, S. C.) 224

“ AFFIDAVIT :— *Vide* CAPIAS.

“ “ :— *Vide* PROMISSORY NOTES.

“ “ :— *Vide* INSOLVENCY.

“ ARTICULATIONS :— *Vide* ENQUÊTES ET MÉRITES.

“ “ :— *Vide* PRELIMINARY PLEA.

“ ASSURANCE :— *Vide* EXCEPTION DÉCLINATOIRE.

“ BAILEE :— *Vide* MOVEABLES.

“ BY-LAW :— *Vide* EXCEPTION À LA FORME.

“ CAPIAS :—In an affidavit for capias it is sufficient to state the amount in “dollars” without any qualification as to a particular currency.

Where the initial only of defendant's christian name is given, this is no ground of petition to quash. (Hall et al. v. Zernichon, S. C.)..... 268

The cause of action was not sufficiently stated in the affidavit in this cause, which did not shew a personal liability of the Defendant, or the nature of that liability. (Do.)..... 268

“ CAUSE OF ACTION :— *Vide* DECLINATORY EXCEPTION.

“ COMMISSION ROGATOIRE :— *Vide* SECURITY FOR COSTS.

PROCÉDURE :—CONSEIL À L'ENQUÊTE :—	A l'enquête sur requête pour faire annuler l'acte de cession, les parties ont droit à un conseil, et l'honoraire de ce conseil doit être taxé à dix piastres comme dans les causes ordinaires. (In re Piton, failli, C. S.)	199
"	CONTRAINTÉ PAR CORPS :— <i>Vide</i> JUDGE IN VACATION.	
"	COSTS :— <i>Vide</i> DÉSISTEMENT	
"	" :— <i>Vide</i> SECURITY FOR COSTS.	
"	" :—The plaintiff having sued out an execution against the Defendant, the latter filed an opposition which was maintained with costs. For these costs certain real estate belonging to Plaintiff was brought to sale, <i>Held</i> , That the opposant could not be collocated for and paid the costs in question by privilege and in preference to the claim of a duly registered hypothecary creditor. (Bruneau v. Gagnon & Gagnon C. R.).....	316
"	DECLINATORY EXCEPTION :— A suit brought in the district of Quebec against a defendant residing at Moisie, in the district of Saguenay, for work done there under a verbal hiring at Quebec, will be dismissed on declinatory exception. (Trudel v. Duval, C. C.).....	180
"	DECLINATORY EXCEPTION :— The Defendant, domiciled at Montreal, wrote to the plaintiff, a resident of Arthabaska, requesting him to take charge of his, the Defendant's, lands at the latter place, and promising to indemnify him for his services. <i>Held</i> : That an action for the value of such services brought in the district of Arthabaska was properly dismissed on declinatory Exception. (Cloutier v. Lapierre, C. R.).....	321
"	DELAY :— <i>Vide</i> ENQUÊTES ET MÉRITES.	
"	" :— <i>Vide</i> INSCRIPTION FOR ENQUETE AND HEARING.	
"	DEPOSIT IN REVIEW :— The Court will not order the Prothonotary to refund a deposit of \$40 made by a party under art. 497 C. C. P., to whom the deposit has been returned, on his succeeding in review, although the judgment in review be reversed, and the judgment reviewed be afterwards re-established in its integrity in appeal. (Regina ex rel. O'Farrell v. Brassard.).....	93
"	DÉSISTEMENT :— Upon a <i>désistement</i> of the judgment, without a tender of costs, the Court of Appeals	

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“ ENQUÊTES ET MÉRITES :—A case may be inscribed for <i>enquêtes et mérites</i> , without the filing of articulations of facts and answers, when the delay for filing the same had expired before the date of the inscription. (Bellay et Guay, C. Q. B.)	91
An interlocutory judgment, rejecting such inscription, is a judgment from which an appeal will lie. (do).....	91
“ EXCEPTION A LA FORME :—Action to annul as illegal a by-law imposing a special tax. Plea, to the form, that Plaintiffs should have proceeded under article 997, C. C P., inasmuch as they charged in effect that the Corporation defendant, had exercised powers not conferred upon it by law : <i>Held</i> , That the remedy provided by article 997, C. C P., did not deprive the plaintiffs of their right at common law to bring the present action in their own name. Any person may seek redress before the tribunals of the country against Corporations by whose acts his rights or property may be injuriously affected, or by whom he may be in any way aggrieved, in the same manner and to the same extent as he could do so against individuals under similar circumstances (Hunt et al. v. Corporation of Quebec, S. C.).....	275
“ EXCEPTION A LA FORME :— <i>Vide</i> MISNOMER.	
“ “ “ :— <i>Vide</i> PROCEDURE (PROHIBITION ; also, JURISDICTION.)	
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“ EXCEPTION DÉCLINATOIRE :—Le tiers porteur de bonne foi d'un effet de commerce daté à Québec, mais réellement fait à Rimouski, ne peut assigner le prometteur de tel effet qu'à Rimouski. (Lepage v. Billy, C. C.).....	383
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"	FIERI FACIAS :—	<i>Vide</i> QUEBEC COURT HOUSE FIRE.	
"	FOLLE ENCHÈRE :—	<i>Vide</i> ADJUDICATAIRE.	
"	INITIALS :—	<i>Vide</i> CAPIAS.	
"	INSCRIPTION FOR PROOF AND HEARING :—	In the Circuit Court non appealable, where the action has been returned in vacation, the notice of inscription for proof and hearing on the merits must be given three days at least beforehand, even when such notice is given during the term. (<i>Neilan v. Demers, C. C.</i>).....	300
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"	INTERVENTION : —	<i>Vide</i> PROCEDURE (PRELIM. PLEA.)	
"	INTERVENTION :—	Under article 158, C. C. P., an Intervenant is bound, within eight days from the admission of his Intervention, either to furnish any further grounds he may have to set up in the principal suit, or to notify the parties that he has no further grounds to offer. Without proof of the allegations of his intervention he cannot obtain the conclusions thereof. (<i>McGroovy v. Gingras and Côté, Interv., S. C.</i>)..	203
"	JUDGE IN CHAMBERS :—	A judge <i>in banco</i> cannot revise and annul a judgment in chambers, granting possession to plaintiffs, on giving security, of goods revendicated, such judgment in chambers having by law the force of a judgment of the court. (<i>The Canada Paper Company v. Cary, S. C.</i>).....	215
"	JUDGE IN VACATION :—	The judgment of a judge in vacation respecting a <i>contrainte par corps</i> is susceptible of being reviewed. During the long vacation a judge has the same powers that he has at any other time of the year with respect to matters to be done out of term. An error in the date of the writ is not fatal. A question as to whether the Deputy Prothonotary is or is not of age cannot be raised incidentally, as attempted in the present case. (<i>Nolan v. Dastous, C. R.</i>)	335
"	JURISDICTION : —	The defendant was employed as a school teacher by Plaintiffs, with the privilege of occupying the school house as her residence. Her engagement having been declared at an end by a resolution of the Plaintiffs, she persisted against their will in occupying the school house.	

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Held : That an action to eject her, under art. 887 C. C. P., could not be maintained for want of jurisdiction, there being no lease and no occupation with the consent of the proprietors of the premises. (School Coms. St. David v. Devarennas.).....	206
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" JURISDICTION :— <i>Vide</i> EXCEPTION DÉOLINATOIRE.	
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" MOVEABLES :—The rule in petitory actions that a deed not pleaded cannot be produced at enquete as part of a chain of titles, does not apply to actions for moveables, and on the contrary in such actions title need not be alleged.	
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" OPPOSANT :— <i>Vide</i> PROCÉDURE (ADJUDICATAIRE.)	
" OPPOSANT :—An opposant may at once demand from Plaintiff a plea to the opposition, instead of moving upon him under article 586, C. C. P., to declare whether he contests the same or not. (Bertrand v. Pouliot and Pouliot, Oppt., S. C.).....	200
" PÉTITION EN RADIATION D'HYPOTHÈQUE :—Held, by Meredith, C. J., with the concurrence of the other judges, that in petitions such as the present the hypothecs to be struck out must be specially described, and that each of the discharges or other papers relied on must be described in the same way and a regular list of exhibits filed. (Loranger v. DeGaspé, S. C.)	80
" PLEA :— <i>Vide</i> PRESCRIPTION.	
" PRELIMINARY PLEA :—Articulations of facts will not be admitted in an issue upon a preliminary plea.	

PROCEDURE :—An intervention allowed, filed and served between the service and entry of the principal action, is not premature, the principal action being *pending* within the meaning of article 154 C. C. P., from the moment of the *service* of the writ and declaration constituting the demand.

The service of an intervention upon the plaintiff's attorney is a sufficient service upon the plaintiff. (*Rees v. Morgan and Baillie Intervg.*, S. C.)

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" **PRESCRIPTION** :—A contestation of an opposition for payment, on the ground that the same was founded on a constituted rent more than 30 years old, without interruption of prescription being alleged, *Held*, bad, on demurrer, because as regards long prescriptions, under article 2188 C. C., they must be pleaded to be taken advantage of, and the opposant was not bound to allege interruption of prescription until that prescription was pleaded to his opposition. (*Sanschagrin v. Sauvageau and Germain*, S. C.).....

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" **PRIVILÉGE** :— *Vide Costs*.

" **PROHIBITION** :—A writ of summons in the nature of a writ of Prohibition cannot be quashed on motion.

A special answer may be filed to an exception to the form. (*Reg. ex rel. O'Farrell v. Garneau*, S. C.)

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" **PROMISSORY NOTE** :—A *défense en fait* to an action on a promissory note, if unsupported by affidavit, will be rejected on motion, as an insufficient denial and in violation of article 145, C. C. P. (*Laprise v. Méthot*, S. C.).....

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" **QUEBEC COURT HOUSE FIRE** :—A writ of *feri facias*, which has been stopped by an opposition to annul, in a cause the record of which has been destroyed by the Quebec Court House fire, is not an *ex parte* proceeding, even though the judgment was obtained *ex parte*, and, consequently, the plaintiff cannot renew his proceeding under sec. 5 of Q. 37 V. c. 15, but must obtain the restoration of the record, or procure leave to proceed under sec. 7 of that act. (*Bouchard v. Dawson*, S. C.).....

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" **REHEARING** :—When the judiciary oath is deferred by the Court, the parties will be heard anew if they so desire. (*Syndics St. Henri v. Carrier*, S. C.).....

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“ REVENDICATION :— <i>Vide JUDGE IN CHAMBERS.</i>	
“ RULE :— <i>Vide WITNESS.</i>	
“ SALE :—A condition of the purchase of a lot of land was that the vendor should furnish to the purchaser within one year the Letters Patent from the Crown, which constituted the former's title. <i>Held</i> : In an action for payment of the price, that the fulfilment of the said condition was a “ precedent obligation ” under article 120, C. C. P., and the non-execution of the same was properly pleaded by Dilatory and not by Temporary Exception. (<i>Bouchard & Thivierge, C. C.</i>).....	152
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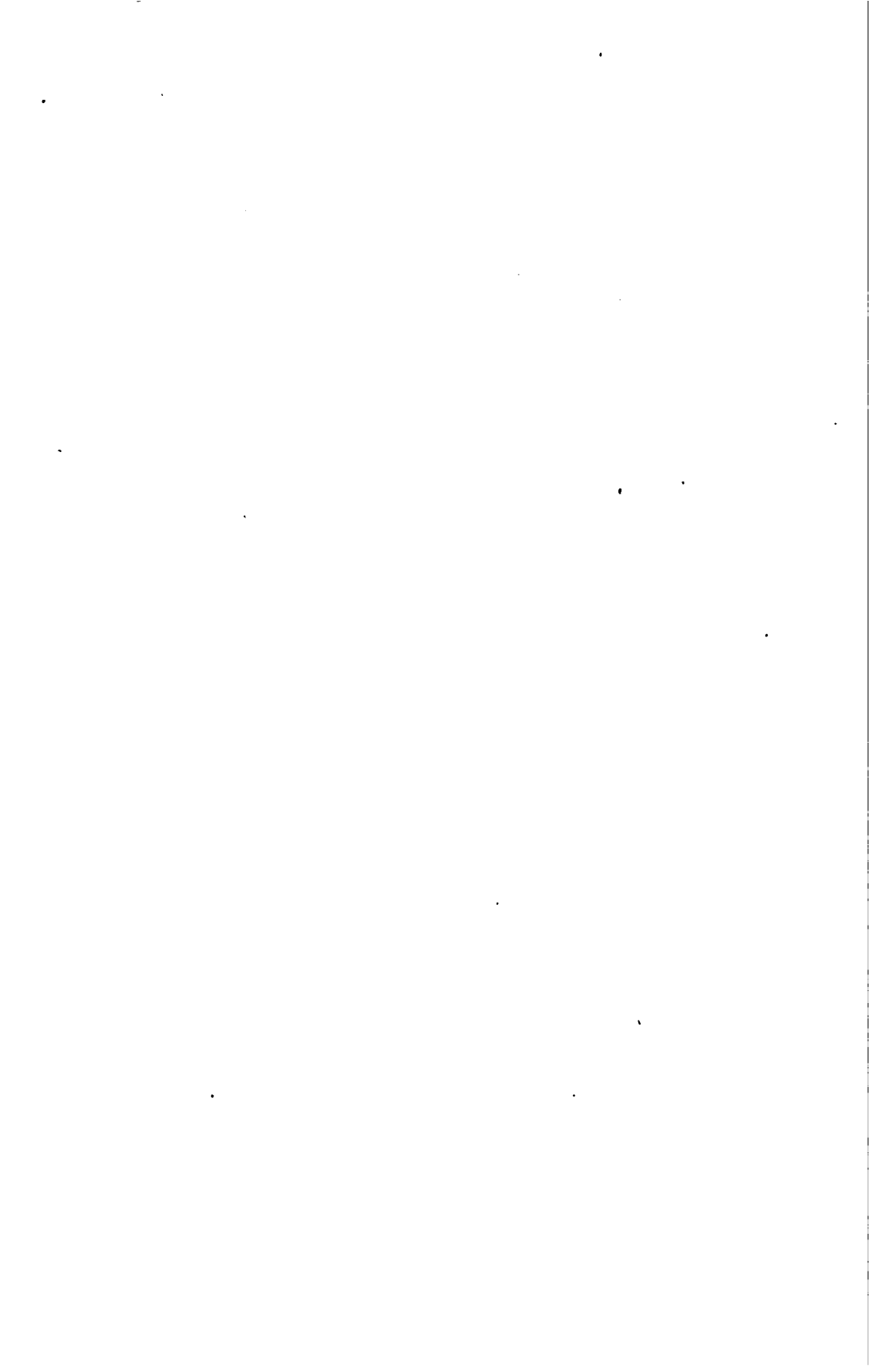
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